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IN THE

Supreme Court of the United States

October Term, 1973
No. 73-507

WILLIAM L. HAMLING, EARL KEMP, SHIRLEY R. WRIGHT, REED ENTERPRISES, INC., DAVID L. THOMAS, LIBRARY SERVICE, INC.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

APPENDIX.

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES.

Date	Proceedings
3/5/71	Ent ord & Fld Ind; Bond fixed at $1,000. P/S each Deft; Ent ord for iss of summons Each Deft; Issd summons to Mars.
3-9-71	Fld $1,000 P/S bond for each of the 4 defts posted 3-9-71. Bail Review—ent ord set at $1,-000 P/S each.

Date	Proceedings
	Defts arr. Ent ord set for O.H. for 4-15-71 at 2 pm. Wm. Hamling, representing all corps, arr. for corps. (HARRIS).
3-12-71	#1-2-3-4—Fld Waiver of Deft's presence.
3-16-71	All—Fld summons ret exec.
3-24-71	#2—Bail Review—Ent ord conditions of bond to be as those set forth in letter of Warren Reese, dated 3-22-71, fld 3-24-71. (Harris)
4-15-71	O.H. All—O.H. waived. Ent ord trans to Judge Thompson for jury trial settg & mots 4-26-71 at 8:30 am. (MCCUE)
4-26-71	All—Arr T/N and plea Not Guilty. (each deft & all corps). Ent ord Trial call 10-13-71 at 9:30 am. cont to 9-8-71 at 9:30 am for mots. (GT).
4-17-71	All—Fld ord modifying bail conditions (GT) (Mld cys).
8-13-71	All—Fld Brief in suppt of mot to dismiss Indictment; mot to dismiss the Indictment pursuant to Rule 12; mot for a B/P; Memo of P/A in suppt of mot for a B/P; mot for discovery and inspection; Memo of P/A in suppt of mot for discovery and inspection; mot for the inspection of the Grand Jury minutes or, alternatively, for particulars as to what evidence was presented to the Grand Jury; Memo of P/A in suppt of mot for the inspection of Grand Jury Minutes, or, alternatively, for particulars as to what evidence was presented to the Grand Jury; Affid of Stanley Fleishman in suppt of mot for the inspection of

Date	Proceedings

Grand Jury Minutes or, alternatively, for particulars as to what evidence was presented to the Grand Jury.

8-20-71 Fld mot for extension of time for filing response to defts' mots, affid of Warren P. Reese; fld ord thereon granting mot. (GT).

8-27-71 Fld memo in response to defts' mot for discovery & inspection; fld memo in opp to defts' mot for inspection of Grand Jury minutes; fld memo in opp to defts' mot for B/P; fld memo in opp to defts' mot to dismiss indictment.

9-7-71 Fld defts' reply memo to Govt's opp to mot for inspection of Grand Jury minutes; fld defts' reply to opp to mot for discovery & inspection; fld defts' reply memo to Govt's opp to mot for B/P; fld defts' reply memo to Govt's opp to mot to dismiss indictment.

9-8-71 #5—Arr T/N & Plea NG. Fld affid in support of mot to dismiss. (GT).

9-8-71 #1, 2, 3, 4, 5, 6, 7—Ent ord hrg mots cont to 9-9-71 @ 2 pm. (GT).

9-9-71 #1, 2, 3, 4, 5, 6, 7—Hearing motion to dismiss, for discovery, for grand jury minutes and bor B/P Ent ord SUBMITTED. Ent ord set for P/T for 10-6-71, 1:30 P.M. (GT).

9-16-71 Fld supp memo in response to item 1 of defts motion for discovery.

9-21-71 Fld ord deny motion to dismiss, deny mot for B/P, grant mot for discovery, deny motion for inspection of grand jury minutes. (GT). Mld cys.

Date	Proceedings
9-22-71	Fld stip and ord thereon to file docs attached as true reproductions. (GT).
10-5-71	Fld defts' req for Court to take judicial notice. Fld mot to determine whether book referred to in cts 19, 20 & 21 of indictmt & advertisement referred to in cts 2 through 14 of indictment are protected by free speech and press provisions of First Amendmt & therefore cannot be found obscene.
10-7-71	Fld ord to clk to allow the attys for deft's & investigators to review list & questionnaires of the trial jury panel venire that will be chosen trial on or about 10-13-71 and to allow attys to make cys of the jury questionnaires at times and places convenient to the Clk of the CT. (GT).
10-6-71	Ent ord pre trial hrg held. Ord exhibits marked. Fld plaintiff's exhibit list.
10-7-71	Fld memorandum brief on relevance of publications receiving snd class mailing privilege and/or copyright. Fld memor brief on admissibility of other publications. Fld govt's trial brief & affid of serv by mail.
10-8-71	ALL—Fld request for additional jury challenges.
10-12-71	ALL—Fld not of mot to challenge jury & strike venire. Fld mot, Fld memo of pts & authorities in support. NOTICED for 10-13-71 @ 9 am (GT).
10-12-71	# 3 & 4—Fld mot for sever of trial. Fld affid in support. Fld suppl quest proposed by defts. (GT).

Date	Proceedings

10-12-71 ALL—Fld supple Questions proposed by plaintiff to jurors on voir dire w/affid of service by mail ( ).

10-12-71 ALL—Fld not of mot to challenge jury panel & to strike venire. Fld mot to strike. Fld memo of pts & authorities in support.

10-8-71 ALL—Fld ord grant add jury challenges. Fld ord re: defts mots. Mld

10-13-71 ALL—Fld deft's proposed jury instructions; memor re reading of alleged obscene matter to jury and appropriate time to submit such matter to jury; memor re pandering; memor brief regarding trial procedure; affid of Stanley Fleishman in support of challenge to trial jury.

10-13-71 ALL—HRG MOT—Swore wits. Ent ord mot to have grand jury transcript included in record denied. Ord mot that grand jury indict was improperly returned denied. Ord all mots considered renewed & denied. Ord mot to dism denied. Ord mot to require govt to elect denied; mot to disclose names of govt wits denied; mot to disclose names of all persons contacted by govt as poss wits denied; mot to disclose names of all persons contacted as poss govt wits who gave evid or statements favorable to deft's granted; mot to sever cases denied; mot to sever deft's Thomas & Wright denied; mot to challenge jury panel denied; mot for continuance denied. (GT).

10-8-71 ALL—Fld ord granting additional jury challenges. Fld ord re: defts mots. Fld ord re: defts' mots. (GT).

Date	Proceedings
10-13-71	JURY TRIAL (ALL) FIRST DAY. Jury sworn voir dire & questioned. Premarked Govt exhibits. Fld Govt's requested jury instructions. Fld. supplemental voir dire questions by deft. Ent ord cont to 10-14-71 9:
10-14-71	ALL—JURY TRIAL 2ND DAY. Additional panel sworn voir dire and questioned. Jury impaneled & sworn. Fld Govt's supplemental response to deft's mot for discovery. Ent ord cont to 10-15-71 @ 9:30 am. (GT).
10-15-71	ALL—JURY TRIAL 3RD DAY. Deft's exhibits pre-marked. Swore wits & fld exhibits. Ent ord cont to 10-19-71 @ 9:30 am. (GT).
10-26-71	Fld mot for discovery & inspection & affid of personal serv & affid of serv by mail.
10-19-71	ALL—JURY TRIAL 4TH DAY—Swore wits & fld exhibits. Defense moves for mistrial—taken under submission. (GT).
10-20-71	ALL—JURY TRIAL 5TH DAY—Swore wits & fld exhibits. Mot for mistrial—denied. (GT).
10-21-71	ALL—JURY TRIAL 6TH DAY—Swore wits & fld exhibits. (GT).
10-22-71	ALL—JURY TRIAL 7TH DAY—Swore wits & fld exhibits. (GT).
10-27-71	ALL—JURY TRIAL 8TH DAY—Swore wits & fld exhibits. (GT).
10-28-71	ALL—JURY TRIAL 9TH DAY—Swore wits & fld exhibits. (GT).

Date	Proceedings

10-29-71 ALL—JURY TRIAL 10TH DAY—Swore wits & fld exhibits. Fld opposition to mot for discovery & inspection. (GT).

11-2-71 ALL—JURY TRIAL 11TH DAY—Swore wits & fld exhibits. (GT).

11-3-71 ALL—JURY TRIAL 12TH DAY—Swore wits & fld exhibits. (GT).

11-4-71 ALL—JURY TRIAL 13th DAY—Swore wits & fld exhibits. (GT)

11-5-71 ALL—JURY TRIAL 14TH DAY—Ent ord deft's mot for mistrial denied. Swore wits & fld exhibits. (GT)

11-9-71 ALL—JURY TRIAL 15TH DAY—Swore wits & fld exhibits. (GT)

11-10-71 ALL—JURY TRIAL 16TH DAY—Ent ord mot for mistrial denied. Swore wits & fld exhibits. (GT)

11-11-71 ALL—JURY TRIAL 17TH DAY—Ent ord mot for mistrial denied. Ent ord mot for J/A taken under submission. Fld exhibits. Ent ord *Govt mot to dismiss counts 6, 14, 18 & 20 granted.* Fld request for Court to take judicial notice. (GT)

11-16-71 ALL—JURY TRIAL 18TH DAY—Ent ord mot for J/A denied. Ent ord Govt mot for discovery denied. Swore wits & fld exhibits. (GT)

11-17-71 ALL—HRG MOTS—Ent ord hrg requisite to flg c.c. of judgmt of USCA denying petition for writ of mandamus and prohibition to be fld. (GT) Fld c.c. of judgmt of USCA denying petition for writ of mandamus and prohibition. (Ent 11-18-71)

Date Proceedings

11-17-71 ALL—JURY TRIAL 19TH DAY—Govt requests TRO to prevent Greenleaf, W. L. Hamling & RGL advertising from advertising a new publication on radio & TV—mot taken under submission. Swore wits & fld exhibits. (GT)

11-19-71 ALL—JURY TRIAL 20TH DAY—Swore wits. (GT)

11-23-71 ALL—JURY TRIAL 21ST DAY—Swore wits & fld exhibits. (GT)

11-24-71 ALL—JURY TRIAL 22ND DAY—Swore wits & fld exhibits. Ent ord mot for mistrial denied. (GT)

11-30-71 ALL—JURY TRIAL 23RD DAY—Swore wits & fld exhibits. Fld Govt's revised proposed jury instructions. (GT)

12-1-71 ALL—JURY TRIAL 24TH DAY—Swore wits. (GT)

12-6-71 Fld deft's objections to Govt's requested jury instructions.

12-7-71 ALL—JURY TRIAL 25TH DAY. Swore wits. (GT)

12-8-71 ALL—JURY TRIAL 26TH DAY. Fld exhibits. Ent ord mot for mistrial denied. (GT)

12-9-71 ALL—JURY TRIAL 27TH DAY. Ent ord mot for mistrial denied. (GT)

12-10-71 ALL—JURY TRIAL 28TH DAY. (GT)

12-14-71 ALL—JURY TRIAL 29TH DAY. (GT)

12-15-71 ALL—JURY TRIAL 30TH DAY. (GT)

Date Proceedings

12-16-71 ALL—JURY TRIAL 31ST DAY. Jury retires to deliberate. (GT)

12-17-71 ALL—JURY TRIAL 32ND DAY. Jury continues deliberations. (GT)

12-20-71 ALL—JURY TRIAL 33RD DAY. Jury continues deliberations. Re-read jury instructions regarding law on obscenity. (GT)

12-21-71 ALL—JURY TRIAL 34TH DAY. Jury continues deliberations. (GT)

12-22-71 ALL—JURY TRIAL 35TH DAY. Jury continues deliberations. re-read certain jury instructions. (GT)

12-23-71 ALL—JURY TRIAL 36TH DAY. Fld Govt's requested additional jury instructions—denied. Fld & ent. verdicts:

#1 (HAMLING) *GUILTY* Cts. 1,2,3,4,5,7,8, 9,10,11,12, & 13

#2 (KEMP) *GUILTY* Cts 1,2,3,4,5,7,8,9,10,11, 12, & 13

#3 (WRIGHT) *GUILTY* Cts 1,2,3,4,5,7,8,9,10, 11,12, & 13

#4 (THOMAS) *GUILTY* Cts 1,2,3,4,5,7,8,9, 10,11,12, & 13

#5 (GREENLEAF CLASSICS INC.) *NOT GUILTY* Cts 1,2,3,4,5,7,8,9,10,11,12, & 13

#6 (REED ENTERPRISES INC.) *GUILTY* Cts 1,2,3,4,5,7,8,9,10,11,12 & 13

#7 (LIBRARY SERVICE INC.) *GUILTY* Cts 1,2,3,4,5,7,8,9,10,11,12 & 13.*

*#1, 2, 3, 4, 6, & 7—Jury polled.

Date	Proceedings
	ALL—Ent ord *mistrial declared as to Cts 15, 16, 17, 19 & 21* Ent ord trial call 3-1-72 at 9:30 & cont to 1-21-72 at 2 pm for hrg mots. #1,2,3,4,6 & 7—Ent ord cont to 2Z7Z72 1:30 for hrg rept P/O & Sent. (GT)
1-11-72	ALL—Fld mot in arrest of judgmt made purs rule 34 t/w affid of serv; fld brief in support of mot in arrest of judgmt t/w affid of serv; fld mot for a new trial made purs to rule 33 t/w affid of serv; fld brief in support of mot for new trial t/w affid of serv; fld mot for judgmt of acquittal made purs rule 29(c) t/w affid of serv; fld brief in support of mot for judgmt of acquittal t/w affid of serv by mail. Fld brief in support of mot for judgmt of acquittal after discharge of jury, made purs to rule 29(c), t/w affid of serv by mail.
1-10-72	#4—Ent ord hrg mot to modif bond—bond modif to allow deft to travel to Mexico. (GT)
1-18-72	Fld suppl brief in support of mot for judgmt of acquittal & in the alternative mot for new trial & in arrest of judgmt t/w affid of serv. Fld affid of Shirley Wright; fld affid of Earl Kemp; Fld affid of David Thomas
1-20-72	#2,3,4—Fld not of mot & mot to strike affids & ord shortening time. Noticed for 1-28-72 @ 10am. W/ord thereon. (GT)
1-21-72	#1,2,3,4,6&7—Ent ord cont to 1-28-72 @ 10 am for hrg mots. (GT) Fld govt's consolidated memor in opposition to defts' various post trial mots t/w affid of serv by mail.

Date Proceedings

1-24-72 ALL—Fld mot re request for CT ord & instructions to jury; fld affid of Louis S. Katz re request for CT ord & instructions to jury. T/W affid of serv by mail.

1-28-72 HRG MOTS—Ent ord mot for arrest of judgmt denied; ord mot for new trial denied; ord mot for J/A denied; ord govt's mot to strike defts' affid granted. (GT)

Fld govt's memor in opposition to defts' mot re request for CT ord & instructions to jury.

2-7-72 #1—Ent ord comm to cust AG for 1 yr on ct 1, Cts 2-5 & 7-13 AG for 3 yrs, ea ct conc but consec w/ct 1. Ord fine cumulative; ct 1 $10,000, cts 2-5 & 7-13 $2,000 ea ct. TOTAL FINE $32,000 to be paid. Ord mot for stay denied. Ord bond on appeal set at $15,000 C/S, ord deft released on O/R until 5pm on 2-8-72. (GT) fld judgmt iss cys (Ent 2-8-72)

#2—Ent ord comm to cust AG on ct 1 for 1 yr & 1 day under 18:4208(a). Cts 2-5 & 7-13 AG for 2 yrs ea ct conc but consec w/ct 1. Ord mot for stay denied, ord bond on appeal set at $10,000 C/S, ord deft released on O/R until 2-8-72 @ 5pm. (GT) fld judgmt iss cys (Ent 2-8-72)

#3—Ent ord comm to cust AG for 6 mos on ct 1, E.S.S. & 2 yrs prob w/super. Cts 2-5 & 7-13 AG for 1 yr ea ct conc. but consec w/ct 1; E.S.S. & 3 yrs prob w/super; prob consec w/ct 1. (CW) fld judgmt iss cys (Ent 2-8-72)

#4—Ent ord comm to cust AG for 6 mos impr on ct 1; E.S.S. & 2 yrs prob w/super. Cts 2-5 & 7-13 AG 1 yr ea ct conc but consec w/ct 1; E.S.S.

Date	Proceedings
	& 3 yrs prob; prob consec w/ct 1. (CW) fld judgmnt iss cys (Ent 2-8-72)
	#6—Ent ord ct 1 fine $10,000. Cts 2-5 & 7-13 fine $3,000 ea ct. Fine cumulative. TOTAL FINE $43,000 to be paid. (CW) fld judgmt iss cys (Ent 2-8-72)
	#7—Ent ord ct 1 fine $1,000. Cts 2-5 & 7-13 fine $1,000 ea ct. Fine cumulative. TOTAL FINE $12,000 to be paid. (CW) fld judgmt iss cys (Ent 2-8-72)
	ALL—Ent ord all bonds exon.
2-7-72	Fld affid of Stanley Fleishman in support of petn's application for bail pending appeal; fld affid of William L. Hamling.
	#1—Fld NOTICE OF APPEAL; atty certification; designation of record on appeal
	#2—Fld NOTICE OF APPEAL; atty certif; design of record;
2-8-72	#1—Fld $15,000 cash bail bond on appeal posted 2-8-72. (GT)
	#2—Fld $10,000 cash bail bond on appeal posted 2-8-72. (GT)
	Issd abstract of order to marshal on deft #1&2.
2-11-72	#3,4,6&7—Fld NOTICES OF APPEAL; designation of record on appeal; and
3-1-72	#3&4—Ent ord bail on appeal set at $1,000 P/S.
	#2—Ent ord bond modif to allow deft to travel to Guadalahara.
	ALL—Ent ord trial call for 11-7-72 @ 9:30 am. (GT)

Date	Proceedings
3-2-72	ALL—Fld stipulation w/ord thereon that retrial for all defts on cts 15-17 and 21 may be scheduled to commence on 11-7-72 @ 9:30 am; and that #3&4's bail on appeal is set for $1,000 P/S on each. (GT)
3-2-72	#3—Fld $1,000 bail bond on appeal w/ approval. (GT) Dated 3-1-72. #4—Fld $1,000 bail bond on appeal w/approval. (GT) Dated 3-1-72.
3-15-72	#1—Fld ord that deft may leave US to travel to Nassau in the Bahamas for period of 7 days to return not later than 4-24-72. (GT)
4-24-72	Fld orig & 3 cys of reptr's trans in 33 vol & vol a thru e. (FRANDEL)
5-1-72	Fld ord nunc pro tunc & extension of time in which to file & docket appeal record w/ord thereon to & including 4-24-72. (GT)
5-11-72	1-6 Mld. Clerk's w/tran to USCA

INDICTMENT.

Filed: March 5, 1971.

The Grand Jury charges that:

COUNT 1

(Title 18, U.S.C., Section 371)

From on or about September 11, 1969, and continuously thereafter up to and including the date of the filing of this indictment, defendants WILLIAM L. HAMLING, EARL KEMP, SHIRLEY R. WRIGHT, DAVID L. THOMAS, GREENLEAF CLASSICS, INC., a California corporation formerly known as PHENIX PUBLISHERS, LTD., REED ENTERPRISES, INC., a California corporation formerly known as REED ENTERPRISES, and LIBRARY SERVICE, INC., a Nevada corporation also known as LIBRARY SERVICES, INC., and formerly known as REED ENTERPRISES, INC., did in the Southern District of California and elsewhere willfully and knowingly conspire, combine, collaborate and agree together and with each other and with London Press, Inc., North Hollywood, California, Robert Reitman, Paul Wisner and Bernard Lieberman, doing business as Regent House, North Hollywood, California, and Richard Harte and Venita Harte, doing business as Academy Addressing & Mailing Service, North Hollywood, California, named herein as unindicted co-conspirators, and with diverse other persons whose names are to the Grand Jury unknown, to violate certain laws of the United States, to wit, Section 1461, Title 18, United States Code, all in violation of Section 371, Title 18, United States Code.

It was a part of the said conspiracy that the defendants would knowingly use the United States mails for the mailing and carriage in the mails, and knowingly cause to be delivered by mail, certain non-mailable matter, to wit, obscene advertisements, obscene books, and advertisements giving information as to where, how, from whom, and by what means said obscene books might be obtained.

OVERT ACTS

At the times hereinafter mentioned, the defendants and the unindicted co-conspirators hereinbefore named, committed the following overt acts among others in furtherance of said conspiracy and to effect the objects thereof:

1. On or about September 11, 1969, in the county of San Diego in the state of California, defendants DAVID L. THOMAS and LIBRARY SERVICE, INC. filed a Municipal License Application with the city of San Diego.

2. On or about September 17, 1969, in the county of San Diego in the state of California, defendants DAVID L. THOMAS and LIBRARY SERVICE, INC., made application for a postage meter license #2431.

3. On or about November 13, 1969, defendants WILLIAM L. HAMLING and REED ENTERPRISES, INC., filed with the Bank of America, University-Highland Branch, 4444 University Avenue, San Diego, California, an authorized signature card for account number 2082-00004.

4. On or about August 20, 1970, defendants SHIRLEY R. WRIGHT and GREENLEAF

CLASSICS, INC., filed with the Bank of America, University-Highland Branch, 4444 University Avenue, San Diego, California, an authorized signature card for account #2086-00007.

5. On or about October 7, 1970, defendants EARL KEMP and LIBRARY SERVICE, INC., filed with postal authorities an application for Post Office Box 20308 at the Grantville Station, San Diego, California.

6. On or about December 7, 1970, unindicted co-conspirator London Press, Inc., North Hollywood, California, billed defendant REED ENTERPRISES, INC., for "80,000 COMMISSION REPORT MAILER (Library Service)", Job number 5495.

7. On or about December 11, 1970, unindicted co-conspirator London Press, Inc., North Hollywood, California, billed defendant GREENLEAF CLASSICS, INC., for 52,249 books in the amount of $86,558.64.

8. On or about January 11, 1971, unindicted co-conspirator Paul Wisner, doing business as Regent House, North Hollywood, California, signed a check payable to the "U.S. Postmaster" in the amount of $3,300.00.

9. On or about January 12, 1971, Richard Harte and Venita Harte, doing business as Academy Addressing & Mailing, North Hollywood, California, labeled, stuffed, and affixed postage to 55,752 envelopes containing advertising matter for defendant LIBRARY SERVICE, INC.

COUNT 2

(18 U.S.C. 2 and 1461)

On or about December 15, 1970, in San Diego County, within the Southern District of California, defendants WILLIAM L. HAMLING, EARL KEMP, SHIRLEY R. WRIGHT, DAVID L. THOMAS, GREENLEAF CLASSICS, INC., a California corporation formerly known as PHENIX PUBLISHERS, LTD., REED ENTERPRISES, INC., a California corporation formerly known as REED ENTERPRISES, and LIBRARY SERVICE, INC., a Nevada corporation also known as LIBRARY SERVICES, INC., and formerly known as REED ENTERPRISES, INC., did knowingly use, and cause to be used, the mails for the mailing, on or about January 12, 1971, and carriage in the mails of an envelope containing a certain obscene, lewd, lascivious, indecent, filthy and vile advertisement from North Hollywood, California, to W. Reiniger, P. O. Box 194, Orange City, Iowa, and did knowingly cause to be delivered by mail according to the direction thereon, said envelope and its contents, all in violation of Sections 2 and 1461, Title 18, United States Code.

COUNT 3

(18 U.S.C. 2 and 1461)

On or about December 15, 1970, in San Diego County, within the Southern District of California, defendants WILLIAM L. HAMLING, EARL KEMP, SHIRLEY R. WRIGHT, DAVID L. THOMAS, GREENLEAF CLASSICS, INC., a California corporation formerly known as PHENIX PUBLISHERS, LTD., REED ENTERPRISES, INC., a California

corporation formerly known as REED ENTERPRISES, and LIBRARY SERVICE, INC., a Nevada corporation also known as LIBRARY SERVICES, INC., and formerly known as REED ENTERPRISES, INC., did knowingly use, and cause to be used, the mails for the mailing, on or about January 12, 1971, and carriage in the mails of an envelope containing a certain obscene, lewd, lascivious, indecent, filthy and vile advertisement from North Hollywood, California, to C. Hazlett, 1715 Hillcrest Drive, Mason City, Iowa, and did knowingly cause to be delivered by mail according to the direction thereon, said envelope and its contents, all in violation of Sections 2 and 1461, Title 18, United States Code.

COUNT 4

(18 U.S.C. 2 and 1461)

On or about December 15, 1970, in San Diego County, within the Southern District of California, defendants WILLIAM L. HAMLING, EARL KEMP, SHIRLEY R. WRIGHT, DAVID L. THOMAS, GREENLEAF CLASSICS, INC., a California corporation formerly known as PHENIX PUBLISHERS, LTD., REED ENTERPRISES, INC., a California corporation formerly known as REED ENTERPRISES, and LIBRARY SERVICE, INC., a Nevada corporation also known as LIBRARY SERVICES, INC., and formerly known as REED ENTERPRISES, INC., did knowingly use, and cause to be used, the mails for the mailing, on or about January 12, 1971, and carriage in the mails of an envelope containing a certain obscene, lewd, lascivious, indecent, filthy and vile advertisement from North Hollywood, California, to J. Lynch, 5700 N. Waterbury Rd., Des Moines, Iowa, and did knowingly cause to be delivered by mail according to the di-

rection thereon, said envelope and its contents, all in violation of Sections 2 and 1461, Title 18, United States Code.

COUNT 5

(18 U.S.C. 2 and 1461)

On or about December 15, 1970, in San Diego County, within the Southern District of California, defendants WILLIAM L. HAMLING, EARL KEMP, SHIRLEY R. WRIGHT, DAVID L. THOMAS, GREENLEAF CLASSICS, INC., a California corporation formerly known as PHENIX PUBLISHERS, LTD., REED ENTERPRISES, INC., a California corporation formerly known as REED ENTERPRISES and LIBRARY SERVICE, INC., a Nevada corporation also known as LIBRARY SERVICES, INC., and formerly known as REED ENTERPRISES, INC., did knowingly use, and cause to be used, the mails for the mailing, on or about January 12, 1971, and carriage in the mails of an envelope containing a certain obscene, lewd, lascivious, indecent, filthy and vile advertisement from North Hollywood, California, to D. Lindell, 521 Woodland Avenue, Fairmont, Minnesota, and did knowingly cause to be delivered by mail according to the direction thereon, said envelope and its contents, all in violation of Sections 2 and 1461, Title 18, United States Code.

COUNT 6

(18 U.S.C. 2 and 1461)

On or about December 15, 1970, in San Diego County, within the Southern District of California, defendants WILLIAM L. HAMLING, EARL KEMP, SHIRLEY R. WRIGHT, DAVID L. THOMAS, GREENLEAF CLASSICS, INC., a California corpora-

tion formerly known as PHENIX PUBLISHERS, LTD., REED ENTERPRISES, INC., a California corporation formerly known as REED ENTERPRISES, and LIBRARY SERVICE, INC., a Nevada corporation also known as LIBRARY SERVICES, INC., and formerly known as REED ENTERPRISES, INC., did knowingly use, and cause to be used, the mails for the mailing, on or about January 13, 1971, and carriage in the mails of an envelope containing a certain obscene, lewd, lascivious, indecent, filthy and vile advertisement from North Hollywood, California, to H. Isenberg, 887 Farmington Avenue, W. Hartford, Connecticut, and did knowingly cause to be delivered by mail according to the direction thereon, said envelope and its contents, all in violation of Sections 2 and 1461, Title 18, United States Code.

COUNT 7

(18 U.S.C. 2 and 1461)

On or about December 15, 1970, in San Diego County, within the Southern District of California, defendants WILLIAM L. HAMLING, EARL KEMP, SHIRLEY R. WRIGHT, DAVID L. THOMAS, GREENLEAF CLASSICS, INC., a California corporation formerly known as PHENIX PUBLISHERS, LTD., REED ENTERPRISES, INC., a California corporation formerly known as REED ENTERPRISES, and LIBRARY SERVICE, INC., a Nevada corporation also known as LIBRARY SERVICES, INC., and formerly known as REED ENTERPRISES, INC., did

knowingly use, and cause to be used, the mails for the mailing, on or about January 13, 1971, and carriage in the mails of an envelope containing a certain obscene, lewd, lascivious, indecent, filthy and vile advertisement from North Hollywood, California, to E. James, 1109 Herr Street, Pittsburgh, Pennsylvania, and did knowingly cause to be delivered by mail according to the direction thereon, said envelope and its contents, all in violation of Sections 2 and 1461, Title 18, United States Code.

COUNT 8
(18 U.S.C. 2 and 1461)

On or about December 15, 1970, in San Diego County, within the Southern District of California, defendants WILLIAM L. HAMLING, EARL KEMP, SHIRLEY R. WRIGHT, DAVID L. THOMAS, GREENLEAF CLASSICS, INC., a California corporation formerly known as PHENIX PUBLISHERS, LTD., REED ENTERPRISES, INC., a California corporation formerly known as REED ENTERPRISES, and LIBRARY SERVICE, INC., a Nevada corporation also known as LIBRARY SERVICES, INC., and formerly known as REED ENTERPRISES, INC., did knowingly use, and cause to be used, the mails for the mailing, on or about January 13, 1971, and carriage in the mails of an envelope containing a certain obscene, lewd, lascivious, indecent, filthy and vile advertisement from North Hollywood, California, to W. Dammann, 31 North 7th Street, W. Terre Haute, In-

diana, and did knowingly cause to be delivered by mail according to the direction thereon, said envelope and its contents, all in violation of Sections 2 and 1461, Title 18, United States Code.

COUNT 9

(18 U.S.C. 2 and 1461)

On or about December 15, 1970, in San Diego County, within the Southern District of California, defendants WILLIAM L. HAMLING, EARL KEMP, SHIRLEY R. WRIGHT, DAVID L. THOMAS, GREENLEAF CLASSICS, INC., a California corporation formerly known as PHENIX PUBLISHERS, LTD., REED ENTERPRISES, INC., a California corporation formerly known as REED ENTERPRISES, and LIBRARY SERVICE, INC., a Nevada corporation also known as LIBRARY SERVICES, INC., and formerly known as REED ENTERPRISES, INC., did knowingly use, and cause to be used, the mails for the mailing, on or about January 13, 1971, and carriage in the mails of an envelope containing a certain obscene, lewd, lascivious, indecent, filthy and vile advertisement from North Hollywood, California, to David Snell, 413 Jerome Avenue, Bristol, Connecticut, and did knowingly cause to be delivered by mail according to the direction thereon, said envelope and its contents, all in violation of Sections 2 and 1461, Title 18, United States Code.

COUNT 10

(18 U.S.C. 2 and 1461)

On or about December 15, 1970, in San Diego County, within the Southern District of California, defendants WILLIAM L. HAMLING, EARL KEMP,

SHIRLEY R. WRIGHT, DAVID L. THOMAS, GREENLEAF CLASSICS, INC., a California corporation formerly known as PHENIX PUBLISHERS, LTD., REED ENTERPRISES, INC., a California corporation formerly known as REED ENTERPRISES, and LIBRARY SERVICE, INC., a Nevada corporation also known as LIBRARY SERVICES, INC., and formerly known as REED ENTERPRISES, INC., did knowingly use, and cause to be used, the mails for the mailing, on or about January 13, 1971, and carriage in the mails of an envelope containing a certain obscene, lewd, lascivious, indecent, filthy and vile advertisement from North Hollywood, California, to Alfred Meyerhoff, 605 Gregory Drive, Greensburg, Pennsylvania, and did knowingly cause to be delivered by mail according to the direction thereon, said envelope and its contents, all in violation of Sections 2 and 1461, Title 18, United States Code.

COUNT 11

(18 U.S.C. 2 and 1461)

On or about December 15, 1970, in San Diego County, within the Southern District of California, defendants WILLIAM L. HAMLING, EARL KEMP, SHIRLEY R. WRIGHT, DAVID L. THOMAS, GREENLEAF CLASSICS, INC., a California corporation formerly known as PHENIX PUBLISHERS, LTD., REED ENTERPRISES, INC., a California corporation formerly known as REED ENTERPRISES, and LIBRARY SERVICE, INC., a Nevada corporation also known as LIBRARY SERVICES, INC., and formerly known as REED ENTERPRISES, INC., did knowingly use, and cause to be used, the mails for the mailing, on or about January 13, 1971, and car-

riage in the mails of an envelope containing a certain obscene, lewd, lascivious, indecent, filthy and vile advertisement from North Hollywood, California, to Allen Crapo, Oxford Center, Oxford, Connecticut, and did knowingly cause to be delivered by mail according to the direction thereon, said envelope and its contents, all in violation of Sections 2 and 1461, Title 18, United States Code.

COUNT 12

(18 U.S.C. 2 and 1461)

On or about December 15, 1970, in San Diego County, within the Southern District of California, defendants WILLIAM L. HAMLING, EARL KEMP, SHIRLEY R. WRIGHT, DAVID L. THOMAS, GREENLEAF CLASSICS, INC., a California corporation formerly known as PHENIX PUBLISHERS, LTD., REED ENTERPRISES, INC., a California corporation formerly known as REED ENTERPRISES, and LIBRARY SERVICE, INC., a Nevada corporation also known as LIBRARY SERVICES, INC., and formerly known as REED ENTERPRISES, INC., did knowingly use, and cause to be used, the mails for the mailing, on or about January 13, 1971, and carriage in the mails of an envelope containing a certain obscene, lewd, lascivious, indecent, filthy and vile advertisement from North Hollywood, California, to A. Kenneth Sivitz, 5436 Bartlett Street, Pittsburgh, Pennsylvania, and did knowingly cause to be delivered by mail according to the direction thereon, said envelope and its contents, all in violation of Sections 2 and 1461, Title 18, United States Code.

COUNT 13

(18 U.S.C. 2 and 1461)

On or about December 15, 1970, in San Diego County, within the Southern District of California, defendants WILLIAM L. HAMLING, EARL KEMP, SHIRLEY R. WRIGHT, DAVID L. THOMAS, GREENLEAF CLASSICS, INC., a California corporation formerly known as PHENIX PUBLISHERS, LTD., REED ENTERPRISES, INC., a California corporation formerly known as REED ENTERPRISES, and LIBRARY SERVICE, INC., a Nevada corporation also known as LIBRARY SERVICES, INC., and formerly known as REED ENTERPRISES, INC., did knowingly use, and cause to be used, the mails for the mailing, on or about January 13, 1971, and carriage in the mails of an envelope containing a certain obscene, lewd, lascivious, indecent, filthy and vile advertisement from North Hollywood, California, to Victor LaMari, Powder Mill Road, Southwick, Massachusetts, and did knowingly cause to be delivered by mail according to the direction thereon, said envelope and its contents, all in violation of Sections 2 and 1461, Title 18, United States Code.

COUNT 14

(18 U.S.C. 2 and 1461)

On or about January 19, 1971, defendants WILLIAM L. HAMLING, EARL KEMP, SHIRLEY R. WRIGHT, DAVID L. THOMAS, GREENLEAF CLASSICS, INC., a California corporation formerly known as PHENIX PUBLISHERS, LTD., REED ENTERPRISES, INC., a California corporation formerly known as REED ENTERPRISES, and LIBRARY SERVICE, INC., a Nevada corporation also known as

LIBRARY SERVICES, INC., and formerly known as REED ENTERPRISES, INC. did knowingly use, and cause the use of, the mails for the mailing and carriage in the mails of an envelope containing a certain obscene, lewd, lascivious, indecent, filthy and vile advertisement from San Diego in the Southern District of California to Shin Tamanha, 1116 Koko Head Avenue, Honolulu, in the District of Hawaii, and did knowingly cause to be delivered by mail according to the direction thereon, said envelope and its contents, all in violation of Sections 2 and 1461, Title 18, United States Code.

COUNT 15

(18 U.S.C. 2 and 1461)

On or about December 15, 1970, in San Diego County, within the Southern District of California, defendants WILLIAM L. HAMLING, EARL KEMP, SHIRLEY R. WRIGHT, DAVID L. THOMAS, GREENLEAF CLASSICS, INC., a California corporation formerly known as PHENIX PUBLISHERS, LTD., REED ENTERPRISES, INC., a California corporation formerly known as REED ENTERPRISES, and LIBRARY SERVICE, INC., a Nevada corporation also known as LIBRARY SERVICES, INC., and formerly known as REED ENTERPRISES, INC., did knowingly use, and cause to be used, the mails for the mailing, on or about January 13, 1971, and carriage in the mails from North Hollywood, California, to Chester H. Pribble, Woolrich, Pennsylvania, a certain envelope containing a printed advertisement giving information where, how, from whom, and by what means an obscene, lewd, lascivious, indecent, filthy and vile book entitled "The Illustrated Presidential Report of

the Commission on Obscenity and Pornography" might be obtained, and did knowingly cause to be delivered by mail according to the direction thereon, said envelope and its contents, all in violation of Sections 2 and 1461, Title 18, United States Code.

COUNT 16

(18 U.S.C. 2 and 1461)

On or about December 15, 1970, in San Diego County, within the Southern District of California, defendants WILLIAM L. HAMLING, EARL KEMP, SHIRLEY R. WRIGHT, DAVID L. THOMAS, GREENLEAF CLASSICS, INC., a California corporation formerly known as PHENIX PUBLISHERS, LTD., REED ENTERPRISES, INC., a California corporation formerly known as REED ENTERPRISES, and LIBRARY SERVICE, INC., a Nevada corporation also known as LIBRARY SERVICES, INC., and formerly known as REED ENTERPRISES, INC., did knowingly use, and cause to be used, the mails for the mailing, on or about January 13, 1971, and carriage in the mails from North Hollywood, to Morris Mendelsohn, 358 Princeton Drive, Pittsburgh, Pennsylvania, a certain envelope containing a printed advertisement giving information where, how, from whom, and by what means an obscene, lewd, lascivious, indecent, filthy and vile book entitled "The Illustrated Presidential Report of the Commission on Obscenity and Pornography" might be obtained, and did knowingly cause to be delivered by mail according to the direction thereon, said envelope and its contents, all in violation of Sections 2 and 1461, Title 18, United States Code.

COUNT 17

(18 U.S.C. 2 and 1461)

On or about December 15, 1970, in San Diego County, within the Southern District of California, defendants WILLIAM L. HAMLING, EARL KEMP, SHIRLEY R. WRIGHT, DAVID L. THOMAS, GREENLEAF CLASSICS, INC., a California corporation formerly known as PHENIX PUBLISHERS, LTD., REED ENTERPRISES, INC., a California corporation formerly known as REED ENTERPRISES, and LIBRARY SERVICE, INC., a Nevada corporation also known as LIBRARY SERVICES, INC., and formerly known as REED ENTERPRISES, INC., did knowingly use, and cause to be used, the mails for the mailing, on or about January 13, 1971, and carriage in the mails from North Hollywood, California, to R. Reinke, 433 South 21 Street, Richmond, Indiana, a certain envelope containing a printed advertisement giving information where, how, from whom, and by what means an obscene, lewd, lascivious, indecent, filthy and vile book entitled "The Illustrated Presidential Report of the Commission on Obscenity and Pornography" might be obtained, and did knowingly cause to be delivered by mail according to the direction thereon, said envelope and its contents, all in violation of Sections 2 and 1461, Title 18, United States Code.

COUNT 18

(18 U.S.C. 2 and 1461)

On or about December 15, 1970, in San Diego County, within the Southern District of California, defendants WILLIAM L. HAMLING, EARL KEMP, SHIRLEY R. WRIGHT, DAVID L. THOMAS,

GREENLEAF CLASSICS, INC., a California corporation formerly known as PHENIX PUBLISHERS, LTD., REED ENTERPRISES, INC., a California corporation formerly known as REED ENTERPRISES, and LIBRARY SERVICE, INC., a Nevada corporation also known as LIBRARY SERVICES, INC., and formerly known as REED ENTERPRISES, INC., did knowingly use, and cause to be used, the mails for the mailing, on or about January 13, 1971, and carriage in the mails from North Hollywood, California, to C. Marguet, Jr., 601 East 10 Street, New Albany, Indiana, a certain envelope containing a printed advertisement giving information where, how, from whom, and by what means an obscene, lewd, lascivious, indecent, filthy and vile book entitled "The Illustrated Presidential Report of the Commission on Obscenity and Pornography" might be obtained, and did knowingly cause to be delivered by mail according to the direction thereon, said envelope and its contents, all in violation of Sections 2 and 1461, Title 18, United States Code.

COUNT 19

(18 U.S.C. 2 and 1461)

On or about February 11, 1971, in San Diego County, within the Southern District of California, defendants WILLIAM L. HAMLING, EARL KEMP, SHIRLEY R. WRIGHT, DAVID L. THOMAS, GREENLEAF CLASSICS, INC., a California corporation formerly known as PHENIX PUBLISHERS, LTD., REED ENTERPRISES, INC., a California corporation formerly known as REED ENTERPRISES, and LIBRARY SERVICE, INC., a Nevada corporation also known as LIBRARY SERVICES, INC., and formerly known as REED ENTERPRISES, INC., did

knowingly use the mails for the mailing and carriage in the mails, and did knowingly cause to be delivered by mail according to the direction thereon, a certain package containing an obscene, lewd, lascivious, indecent, filthy and vile book entitled, "The Illustrated Presidential Report of the Commission on Obscenity and Pornography" from San Diego, California, to Harry Bakker, P. O. Box 26015, Lawrence, Indiana, all in violation of Sections 2 and 1461, Title 18, United States Code.

COUNT 20

(18 U.S.C. 2 and 1461)

On or about February 12, 1971, in San Diego County, within the Southern District of California, defendants WILLIAM L. HAMLING, EARL KEMP, SHIRLEY R. WRIGHT, DAVID L. THOMAS, GREENLEAF CLASSICS, INC., a California corporation formerly known as PHENIX PUBLISHERS, LTD., REED ENTERPRISES, INC., a California corporation formerly known as REED ENTERPRISES, and LIBRARY SERVICE, INC., a Nevada corporation also known as LIBRARY SERVICES, INC., and formerly known as REED ENTERPRISES, Inc., did knowingly use the mails for the mailing and carriage in the mails, and did knowingly cause to be delivered by mail according to the direction thereon, a certain package containing an obscene, lewd, lascivious, indecent, filthy and vile book entitled, "The Illustrated Presidential Report of the Commission on Obscenity and Pornography" from San Diego, California, to S. Morris, P. O. Box 46, Tarzana, California, all in violation of Sections 2 and 1461, Title 18, United States Code.

COUNT 21

(18 U.S.C. 2 and 1461)

On or about February 17, 1971, in San Diego County, within the Southern District of California, defendants WILLIAM L. HAMLING, EARL KEMP, SHIRLEY R. WRIGHT, DAVID L. THOMAS, GREENLEAF CLASSICS, INC., a California corporation formerly known as PHENIX PUBLISHERS, LTD., REED ENTERPRISES, INC., a California corporation formerly known as REED ENTERPRISES, and LIBRARY SERVICE, INC., a Nevada corporation also known as LIBRARY SERVICES, INC., and formerly known as REED ENTERPRISES, INC., did knowingly use the mails for the mailing and carriage in the mails, and did knowingly cause to be delivered by mail according to the direction thereon, a certain package containing an obscene, lewd, lascivious, indecent, filthy and vile book entitled, "The Illustrated Presidential Report of the Commission on Obscenity and Pornography" from San Diego, California, to William H. Rogers, P. O. Box 25, Boston, Massachusetts, all in violation of Sections 2 and 1461, Title 18, United States Code.

A TRUE BILL:
/s/ H. Albert Wallace
Foreman

/s/ Harry D. Steward
HARRY D. STEWARD
United States Attorney

MOTION TO DISMISS INDICTMENT.

Filed: .....

COME NOW the Defendants, WILLIAM L. HAMLING, EARL KEMP, SHIRLEY R. WRIGHT, DAVID L. THOMAS, GREENLEAF CLASSICS, INC., a California corporation, formerly known as PHENIX PUBLISHERS, LTD., REED ENTERPRISERS, INC., a California corporation, formerly known as REED ENTERPRISES, and LIBRARY SERVICE, INC., a Nevada corporation, also known as LIBRARY SERVICES, INC., and formerly known as REED ENTERPRISES, INC., and move this Court for an Order dismissing the Indictment herein, and each and every count thereof, on the following grounds:

1. The Indictment, and each and every count thereof, fails to state facts sufficient to constitute an offense against the United States.

2. No facts sufficient to constitute an offense against the United States were presented to the Grand Jury which returned each count of the Indictment herein.

3. The Indictment, and each and every count thereof, fails to state facts sufficient to constitute an offense against the United States because the Indictment failed to allege the essential elements of obscenity.

4. Counts 2-18, inclusive, of the Indictment fail to state facts sufficient to constitute an offense under 18 U.S.C. §1461 because the advertisements are regulated exclusively by 39 U.S.C. §3008, which section deals with advertisements which are allegedly pandering.

5. The Indictment, and each and every count thereof, fails to state facts sufficient to constitute an offense against the United States because:

(a) The advertisements referred to in Counts 2-14, inclusive, of the Indictment are, as a matter of law, not obscene, because:

(i) The book "The Illustrated Presidential Report of the Commission on Obscenity and Pornography", referred to in Counts 19-21, inclusive, of the Indictment, is clearly protected by the free speech and press provisions of the First Amendment and, as a matter of law, is not obscene.

(b) The advertisements referred to in Counts 2-14, inclusive, of the Indictment, are as a matter of law not obscene, but on the contrary are protected by the free speech and press provisions of the First Amendment to the United States Constitution.

(c) The advertisements referred to in Counts 15-18, inclusive, of the Indictment give information as to where, how, from whom and by what means a book, protected by the free speech and press provisions of the First Amendment might be obtained. The advertisements referred to in said counts do not give information where, etc., an obscene book might be obtained.

(d) Since the book, referred to in Counts 19-21, inclusive, of the Indictment are protected by the free speech and press provisions of the First Amendment, and the advertisements referred to in Counts 2-18, inclusive, of the Indictment are similarly protected, it follows that a "conspiracy" to mail the constitutionally protected book and advertisements does not constitute an offense against the United States.

6. The Indictment, and each and every count thereof, fails to state facts sufficient to constitute an offense against the United States because 18 U.S.C. §1461, on its face and as construed and applied, violates the free speech, due process and equal protection provisions of the First, Fifth and Sixth Amendments, and the cruel and unusual punishment provisions of the Eighth Amendment, and the right of the People preserved by the Ninth and Tenth Amendments to the United States Constitution.

The Motion is based upon the Indictment herein and all the papers and records on file, including defendants' Brief in support of said Motion to Dismiss the Indictment, and is made pursuant to Rule 12 of the Federal Rules of Criminal Procedure.

STANLEY FLEISHMAN, INC. and
GOSTIN & KATZ
/s/ By Stanley Fleishman
STANLEY FLEISHMAN
Attorney for Defendants

MOTION FOR BILL OF PARTICULARS.

Filed: .....

COME NOW the defendants, and move this Court for an Order directing the plaintiff to furnish and file a Bill of Particulars to the Indictment, and each and every count thereof, in the following respects:

1. State whether the terms "obscene," "lewd," "indecent," "lascivious," "filthy" and "vile" used in Counts 2-21 of the Indictment are intended to have the same meaning. If the terms have different meanings, state the meaning of each such term.

2. If the said terms are all intended to have the same meaning, to wit, "obscene," state the essential elements of that term.

3. State whether it is claimed that the advertisements named in Counts 2-14 of the Indictment are utterly without redeeming social value.

(a) State whether any evidence was presented to the Grand Jury to this effect.

(b) State the name of the person or persons so testifying.

4. State whether it is claimed that the book offered for sale in the advertisements in Counts 2-14 of the Indictment is utterly without redeeming social value.

(a) State whether any evidence was presented to the Grand Jury to this effect.

(b) State the name of the person or persons so testifying.

5. State whether it is claimed that the book named in Counts 19-21 of the Indictment appeals to the prurient interest of the average person in the Nation as a whole.

(a) State whether any evidence was presented to the Grand Jury to this effect.

(b) State the name of the person or persons so testifying.

6. State whether it is claimed that the advertisements named in Counts 2-14 of the Indictment appeal to the prurient interest of the average person in the Nation as a whole.

(a) State whether any evidence was presented to the Grand Jury to this effect.

(b) State the name of the person or persons so testifying.

7. State whether it is claimed that the advertisements named in Counts 15-18 of the Indictment are non-mailable, assuming that the book "The Illustrated Presidential Report of the Commission on Obscenity and Pornography" is not obscene.

(a) State whether any evidence was presented to the Grand Jury to this effect.

(b) State the name of the person or persons so testifying.

8. State whether it is claimed that the advertisements named in Counts 2-18 of the Indictment go substantially beyond customary limits of candor in the Nation as a whole, in the description or representation of matters pertaining to sex, nudity or excretion.

(a) State whether any evidence was presented to the Grand Jury to this effect.

(b) State the name of the person or persons so testifying.

9. State whether it is claimed that the book named in Counts 19-21 of the Indictment go substantially

beyond customary limits of candor in the Nation as a whole, in the description or representation of matters pertaining to sex, nudity or excretion.

(a) State whether any evidence was presented to the Grand Jury to this effect.

(b) State the name of the person or persons so testifying.

10. State whether it is claimed that each of the defendants knew that the advertisements named in Counts 2-14 of the Indictment and the book named in Counts 19-21 of the Indictment:

(a) Went substantially beyond customary limits of candor in the Nation as a whole, in the description or representation of matters pertaining to sex, nudity or excretion; and

(b) Appealed to the prurient interest of the average person in the Nation as a whole; and

(c) Were utterly without redeeming social value.

(i) State whether any evidence was presented to the Grand Jury to this effect.

(ii) State the name of the person or persons so testifying.

11. State whether the persons named as addressees in each count of the Indictment are real or fictitious. If the names are fictitious, set forth the real names of the said persons.

12. State whether the persons named as addressees in each count of the Indictment are postal inspectors or other employees of the Federal Government, whether using their real names or using a fictitious name.

13. Set forth and produce the specific envelopes, books and advertisements contained in each count of the Indictment.

The aforesaid Motion is made upon the grounds that the said Particulars are required by the defendants in order to make adequate preparation for their defense; to avoid prejudicial surprise at the trial; to protect defendants against a second prosecution for the same offense, and upon the further grounds that a failure to grant the aforesaid Particulars will deprive the defendants of their defenses to the charges contained in the Indictment; arbitrarily compel them to stand trial thereunder, and arbitrarily deprive defendants of a fair trial without due process of law, in violation of the due process provision of the Fifth Amendment to the United States Constitution and the rights guaranteed to them by the Sixth Amendment to the United States Constitution to be informed of the nature and cause of the accusation made against defendants.

This Motion will be based upon Rule 7(f) of the Federal Rules of Criminal Procedure, the pertinent provisions of the Fifth and Sixth Amendments to the Constitution of the United States, the Brief in support of the Motion, the Indictment, and all the papers and proceedings heretofore had herein.

DATED: August 11, 1971.

STANLEY FLEISHMAN, INC. and
GOSTIN & KATZ
/s/ By Stanley Fleishman
STANLEY FLEISHMAN
Attorneys for Defendants

MOTION FOR INSPECTION OF GRAND JURY MINUTES.

FILED: .....

DEFENDANTS MOVE THE COURT for an Order permitting the defendants to inspect the Minutes of the Grand Jury, pursuant to Rules 6 and 16(b) of the Federal Rules of Criminal Procedure.

The aforesaid Motion is made upon the grounds that the said inspection of the Grand Jury Minutes is required by the said defendants in the interests of justice, because the inspection of the proceedings before the Grand Jury is reasonably required and is material to the preparation of the defense of defendants; because inspection of the Grand Jury Minutes will enable the Court to determine substantial legal and constitutional questions raised by the Motions of the defendants to dismiss the Indictment which should be determined by the Court prior to trial; because denial of the inspection of the Grand Jury Minutes would arbitrarily deprive defendants of a fair trial and their liberty without due process of law, contrary to the due process and fair trial provisions of the Fifth and Sixth Amendments to the Constitution; and because due and timely inspection of the Grand Jury Minutes is necessary in order to prevent the suppression of constitutionally protected material and to guarantee the public's access to such constitutionally protected material under the First Amendment.

In the event that the Minutes were not transcribed, defendants request the Court to order the Government to state, in writing:

1. Whether any evidence was presented to the Grand Jury that the material charged in the Indictment was utterly without redeeming social importance.

(a) If there was any such testimony, the name and address of the person or persons so testifying.

(b) If there was any such testimony, the gist of said testimony.

2. Whether any evidence was presented to the Grand Jury that the material charged in the Indictment went substantially beyond customary limits of candor in the Nation as a whole in the description or representation of matters pertaining to sex, nudity or excretion.

(a) If there was any such testimony, the name and address of the person or persons so testifying.

(b) If there was any such testimony, the gist of the said testimony.

3. Whether any evidence was presented to the Grand Jury that the material charged in the Indictment appealed to the prurient interest of the average person in the Nation as a whole.

(a) If there was any such testimony, the name and address of the person or persons so testifying.

(b) If there was any such testimony, the gist of said testimony.

4. Whether any evidence was presented to the Grand Jury that the defendants, or any of them, knew that the material charged in the Indictment was utterly without redeeming social importance; and went sub-

stantially beyond customary limits of candor in the Nation as a whole in the description or representation of matters pertaining to sex, nudity or excretion; and appealed to the prurient interest of the average person in the Nation as a whole.

(a) If there was any such testimony, the name and address of the person or persons so testifying.

(b) If there was any such testimony, the gist of said testimony.

This Motion will be based upon Rules 6 and 16(b) of the Federal Rules of Criminal Procedure, the pertinent provisions of the First, Fifth and Sixth Amendments to the United States Constitution, the Affidavit of Stanley Fleishman and the Brief in support of this Motion, as well as all the records on file herein.

DATED: August 11, 1971.

STANLEY FLEISHMAN, INC. and
GOSTIN & KATZ
/s/ By Staney Fleishman
STANLEY FLEISHMAN
Attorneys for Defendants

AFFIDAVIT OF STANLEY FLEISHMAN IN SUPPORT OF MOTION FOR INSPECTION OF GRAND JURY MINUTES.

Filed: .....

State of California, County of Los Angeles—ss.

STANLEY FLEISHMAN, being first duly sworn, deposes and says:

1. I am attorney for defendants in the above-entitled matter and make this Affidavit in support of Motion for Inspection of the Grand Jury Minutes or, Alternatively, for Particulars as to What Evidence was Presented to the Grand Jury.

2. I have labored for many years in the area of the law having to do with obscenity. I argued the first modern obscenity case in the Supreme Court, *Alberts v. California*, 354 U.S. 476, and some one-half dozen additional cases since that date. Additionally, I have tried a large number of obscenity cases in various parts of the country. I am, I believe, an "expert" in this area of law.

3. In my opinion, it is necessary for the Government to present to the Grand Jury at least some evidence of each of the elements of the offense of a violation of 18 U.S.C. §1461 to validate a grand jury indictment. These elements, at a minimum, are:

(a) that the material was utterly without redeeming social importance; and

(b) that the material went substantially beyond customary limits of candor in the Nation as a whole in the description or representation of matters pertaining to sex, nudity or excretion; and

(c) that the material appealed to the prurient interest of the average person in the Nation as a whole.

4. In my opinion, guilty knowledge is a constitutionally mandated requirement under 18 U.S.C. §1461. In my opinion, this means that the prosecution is required to allege and prove that the defendants knew the charged material was utterly without redeeming social importance; and went substantially beyond customary limits of candor in the Nation as a whole in the description or representation of matters pertaining to sex, nudity or excretion; and appealed to the prurient interest of the average person in the Nation as a whole.

5. It is my belief, based upon the handling of scores of obscenity cases, that the Grand Jury was not presented with any evidence establishing that the charged material was obscene under the three-pronged test set forth by the United States Supreme Court in *Memoirs v. Massachusetts*, 383 U.S. 413.

6. It is my belief, based upon the handling of scores of obscenity cases, that the Grand Jury was not presented with any evidence that the defendants had knowledge that the material met the three-pronged test set forth by the United States Supreme Court in *Memoirs v. Massachusetts, supra.*

7. In a large number of federal obscenity cases the Government has advised the Court that no minutes of the Grand Jury proceedings were available. Even if there are no such minutes the Government should be required to state in writing what, if any, evidence was presented to the Grand Jury with regard to the obscenity of the material and the knowledge of the defendants.

/s/ Stanley Fleishman
STANLEY FLEISHMAN

GOVERNMENT'S OPPOSITION AND RESPONSE TO DEFENDANTS' MOTION FOR BILL OF PARTICULARS.

Filed: August 27, 1971.

Comes now the United States, by its attorney, the United States Attorney for the Southern District of California, and in opposition to defendants' Motion for a Bill of Particulars in the above captioned matter, states as follows:

The defendant's Motion for a Bill of Particulars consists of thirteen separate requests. The Government's response will be similarly designated.

1. The terms "obscene, lewd, indecent, lascivious, filthy, and vile" used in Counts 2-21 of the indictment are intended to have the same meaning to wit: "obscene." See *Manual Enterprises v. Day*, 370 U.S. 478, 483-84, n.5 (1962).

2. With respect to the defendants' request that the Government "state the essential elements of that term (obscene)," the Government notes that counsel for the defendants has apparently already arrived at a conclusion regarding what he personally perceives to be at least the bare minimum insofar as "essential elements" of that term are concerned. See Affidavit of Stanley Fleischman in Support of Motion for Inspection of Grand Jury Minutes, p. 2. Without conceding at this time the accuracy of defense counsel's view of the law in that regard, the Government will, for purposes of answering this motion, assume *arguendo* that the three-fold test, as enumerated in the plurality opinion

in *Memoirs v. Massachusetts*, 383 U.S. 413, 418 (1966), is the appropriate standard.

3. Such an assumption having been made, the Government's response to Point 3 of the defendants' Motion for a Bill of Particulars is that a claim of absence of redeeming social value in the advertisements alleged to be obscene in Counts 2 through 14 of the indictment is implicit in the allegation in each count. With respect to subsections (a) and (b) of Point 3 of defendants' Motion for a Bill of Particulars, the Government's response in that regard is controlled by its Memorandum in Opposition to Defendants' Motion for Inspection of the Grand Jury Minutes filed in this matter. The Government hereby offers the same response to the other similar inquiries found in the defendants' Motion for a Bill of Particulars, requests 4-9, inclusive.

4. It is not claimed in Counts 2 through 14 that the book offered for sale in the advertisements in those counts of the Indictment is utterly without redeeming social value. Such an allegation is quite irrelevant to the charges proffered in Counts 2 through 14. However, this statement is no concession by the Government that the book *does* have "redeeming social value." This is merely to state that absence of such a quality is not alleged in those particular Counts.

5. Implicit in an allegation of obscenity of the book in question, as found in Counts 19 through 21 of the Indictment, is the claim that the book appeals to the prurient interest of the average person. The Govern-

ment, however, notes that there is no requirement to show prurient interest of the average person "in the Nation as a whole." The "Nation as a whole" requirement applies only to the issue of "contemporary community standards." See *Jacobellis v. Ohio*, 378 U.S. 184, 191-93 (1964).

6. Subject to the same reservation articulated in No. 5, *supra*, the Government states that it is implicit in an allegation of obscenity as to the advertisements named in Counts 2 through 14 that such advertisements appeal to the prurient interest of the average person.

7. It is not so claimed.

8. Insofar as Counts 2 through 14 are concerned, implicit in an allegation of obscenity as to the advertisements named therein is the allegation that said advertisements go substantially beyond customary limits of candor in the Nation as a whole, in the description or representation of matters pertaining to sex, nudity, or excretion. There is no such requirement insofar as the charge brought in Counts 15 through 18 is concerned, and no such allegation is there made. However, this statement is no concession on the part of the Government that the advertisements charged in Counts 15 through 18 are not obscene. This is merely to state that the Government need not assume that burden of proof insofar as those four Counts are concerned.

9. Implicit in an allegation that the books named in Counts 19 through 21 are obscene is the allegation

that the books named therein go substantially beyond customary limits of candor in the Nation as a whole, in the description or representation of matters pertaining to sex, nudity, or excretion.

10. It is not claimed that each of the defendants knew that the materials charged in Counts 2 through 14 and 19 through 21 of the indictment were, in fact, obscene. The allegation of knowledge in those counts calls for nothing more than knowledge on the part of each defendant as to the nature of the contents of each mailing. See *Rosen v. United States*, 161 U.S. 29 (1896). For further discussion of this point, see Point II(B) of the Government's Memorandum in Opposition to Defendants' Motion to Dismiss filed in this matter.

11. The persons named as addressees in Counts 2 through 13 and Counts 15 through 18 of the indictment are real persons. The persons named as addressees in Count 14 and in Counts 19 through 21 of the indictment are fictitious. The real names of the fictitious persons listed in those Counts of the indictment are set out below:

Count 14—Donald Schoof
Count 19—Robert Herzog
Count 20—Donald Schoof
Count 21—Frank Allain

12. The fictitious name addressees in the indictment (see No. 11, *supra*), are all Postal Inspectors employed by the Postal Inspection Service of the United States Postal Service.

13. As noted in Item 6 of the Government's Memorandum in Response to Defendants' Motion for Discovery and Inspection, the Government intends to, prior to trial, allow the defendants ample opportunity to examine the materials alleged in each and every count of the indictment to be non-mailable.

Respectfully submitted,

/s/ Harry D. Steward
HARRY D. STEWARD
United States Attorney

/s/ Warren P. Reese
WARREN P. REESE
Chief Assistant United States Attorney

/s/ Larry E. Butcher
LARRY E. BUTCHER
Department of Justice
Criminal Division
Washington, D.C. 20530

AFFIDAVIT OF JAY ZISKIN IN SUPPORT OF MOTION TO DISMISS INDICTMENT.

FILED: September 8, 1971.

State of California, County of Los Angeles—ss.

JAY ZISKIN, being first duly sworn, deposes and says:

1. I am an attorney duly licensed to practice in the State of California and am also a clinical psychologist licensed to practice in the said State. In addition, I am a Professor in counseling at California State College at Los Angeles. I received my LLB degree from the University of Southern California Law School in 1946 and my Ph.D. in Clinical Psychology from the University of Southern California in 1962.

2. I was engaged in the practice of law from 1946 to 1962. Since then, I have been in private practice as a consulting psychologist. I have also been employed since 1962 as a counselor by the California State College at Los Angeles, with the present rank of Professor in Counseling. I have taught courses in psychology at both the University of Southern California and at California State College at Los Angeles, including courses in Introductory Psychology, Contemporary Psychology, History of Psychology, Testing the Mentally and Physically Atypical and Methods of Appraising Personality. I have taught courses in Law and Psychology at the University of Southern California Law Center and in the University of Southern California Graduate Department of Psychology. I was Chief Research Psychologist for the University of Southern California Institute of Psychiatry and Law. I am a former member of the American Psychological Association Committee on Psychology and the Law and former President of the American

Psychology-Law Society. I am currently Contributing Editor of the Psychology and Law section of the Journal of Professional Psychology and Chairman of the California State Psychological Association Task Force on Justice and Law Enforcement. I served as a panel member in a symposium on psychiatry and law at the conference of California Judges in 1964. I have presented several papers at professional association meetings and have published several articles in the area of psychology and the law. I am the author of a book, "Coping With Psychiatric and Psychological Testimony", Law and Psychology Press, 1970.

I have been qualified as an expert and have testified regarding psychological issues in a variety of legal matters. I have appeared as an expert witness in several obscenity trials; have presented papers on the role of the psychologist in obscenity trials before professional organizations; and have lectured before various religious and civic groups on the subject of obscenity and the law.

3. In my opinion, the tests for judging obscenity are incapable of objective measurement. The terms are vague and incomprehensible. For example, with respect to the requirement that the material appeal to the "prurient interest of the average person", the Supreme Court, because of the inherent vagueness of the terms, has been required to further define the words as "a shameful or morbid interest in nudity, sex or excretion". From a psychological point of view, the "prurient interest test", with its myriad definitions of "lustful thoughts, itching, morbid, lascivious longings, shameful and morbid interest", suffers not only from incomprehensibility of meaning, but is also basically untenable from a substantive viewpoint.

To begin with, the term "average" has multiple meanings, rather than a singular meaning. It may signify the arithmetic mean, it may signify the median, it may signify the mode. It may mean the middle 50% or, at least in psychological usage, the middle 68% (based upon the concept of one standard deviation above or below the arithmetic mean).

Further, with regard to the type of sexual stimuli responded to and the manner or nature of the response, there appears to be such a wide variety of responses in the American population as to preclude any meaningful application of the term "average". The findings of the President's Commission on Obscenity and Pornography, as well as earlier and other works, strongly indicate that the response to sexual stimuli is influenced by age, sex, religious orientation, social class, family background, sexual experience and other personal experiences. (See Report, Bantam Ed. 1970, pp. 233-256). Within the American populace, there is such heterogeneity with regard to sexual matters as to preclude establishment of any frame of reference that would encompass a group of such proportion as to be called "representative".

Moreover, it is doubtful that material could be found that appeals predominately to the shameful or morbid interest in sex of the average person for the simple reason that such interest does not exist in average people, assuming that by average people we mean psychologically normal people. Interest and curiosity concerning sex and sexual matters is entirely normal. Interest in the unusual, the exotic, the bizarre, are quite normal. In fact, operators of circuses have exploited this very normal human motive for generations. A

shameful or morbid interest in sex (or any other matter) would at least be suggestive, if not indicative, of some psychological disturbance in the individual.

The prurient interest test is simply a self-contradictory and meaningless test. An "average person" does not have an abnormal interest, and the Supreme Court has rejected any test based upon what the average person would conclude has prurient interest for some "highly susceptible person". Words like "prurient", "morbid", "itching", "shameful", and like terms, may reflect the subjective moral, literary or artistic viewpoints of particular individuals, but the terms do not provide any clear and certain standard for ascertaining the difference between material which purportedly has a "legal" erotic effect or "illegal" erotic effect.

4. The terms "contemporary community standards" or "customary limits of candor" are as ambiguous and incomprehensible as "prurient interest". The facts of heterogeneity with regard to sexual matters heretofore discussed on the issue of prurience apply equally to the element of customary limits of candor. Whether material goes substantially beyond contemporary community standards will depend on the geographic character of the "community"; the composition of the particular "community" and, finally, who the person is who purports to determine what "community standards" are. The customary limits of candor at a military barracks (if, indeed, there are any such limits) are vastly different from those in the church. The limits of candor among young people appear to be considerably different from those existing among older people.

5. No commodity that is consumed by significant numbers of people can be deemed utterly without re-

deeming social value. The mere fact of its consumption indicates that it is meeting the needs of that segment of society which consumes it. No one would deny that the printing of books in braille has social value, although it meets the needs of only a very small minority of the population. As explicit sexual materials meet whatever the needs may be of a considerable segment of the population, they too must be considered to have social value per se. Liquor, certainly not an unmixed blessing, has demonstrated by its long history that it must be of some use to man. The long history of "obscenity" suggests the same conclusion. The permeation of the world's literature with themes of violence, treachery, perfidy and foul play indicate that some need of man is being met by such themes. So it is too with the nearly universal existence of explicit sexual material.

There is very little, if any, "obscene" material which does not have some educational value. There is a great deal of sexual ignorance in America. Simply learning about something not previously known is educative. If nothing else, explicit sexual materials in some instances serve to acquaint people with the existence of sexual behaviors and sexual attitudes with which they may not have been previously familiar. In another sense, as long as "obscenity" continues to be a social or legal issue, people ought to have the opportunity to observe it and learn what it is so that they may make rational decisions based on their own experience with regard to their own position on the issues of "obscenity". That explicit sexual materials are found educational or informative by a considerable proportion of viewers appears fully supported by the findings of the Commission. Also, the findings of the Commission indicate that viewing of explicit sexual materials

by married couples has led to an increased openness in discussing sex, with new learning about sex as an undoubted consequence.

It cannot be doubted that explicit sexual materials have recreational value in providing entertainment and escape for individuals. When the average individual who spends most of his adult life going about his work, raising his family, keeping up his home, etc., reads a book, he is generally not interested in reading a book about an average individual who goes about his work, raises his family, and so forth. He wants to read about the less usual kind of person, a hero or a villain, or someone with a problem that is different from those most people face, or who operates in an exotic or unusual environment, or who lives a more dramatic or colorful life than most people do, or who does something out of the ordinary. James Thurber's classic short story, "The Secret Life of Walter Mitty", illustrates this point. While accompanying his wife on a routine shopping trip, Walter enjoys a series of imaginary adventures. For example, he executes heroic feats as a World War I fighter pilot or an FBI agent. He is vicariously or imaginatively experiencing activities in which he will never engage. He enjoys this because he is gratifying a well-known human urge for adventure and new experience and recognition.

William Thomas, a social psychologist, many years ago described the four basic drives of man as the desire for love, recognition, new experience and security. For the average person, the latter three urges must largely depend on the fictional or imagined experience. In books or in daydreams he can be the conquering hero without danger of injury. He can be the superlover without the anxieties, guilts or other personal

problems which might exist in real life affairs. He can be important, serious, devil-may-care, handsome, rich, brilliant, witty, and he can suffer through conflict and misfortune, indulge in all manner of good and all manner of evil, without in any way affecting his real life, except possibly to return to it refreshed as a result of his fictional excursion.

Reading or viewing explicit sexual materials, or other materials, provides the same escape, entertainment and renewal as other recreational activities. One man may choose this form of entertainment, while another kills animals with a gun or watches two men beat each other savagely in the ring or 22 men attempting to batter each other physically in a football game, or he may lie by the riverbank with a fishing pole in hand, or dance, or chase a little white ball over a golf course. Such activities also provide a vital safety valve in human existence. They enable him to escape temporarily from the tensions and problems of everyday life. The magnitude of the entertainment and recreation industries in America attest to the depth of this human need. As considerable numbers of people appear to find satisfaction of this need through sexual materials, the social value of such materials in this regard seems obvious.

With regard to literary and artistic values, it is difficult to imagine any materials which would not possess these to some degree. The elements of aesthetic experience have not yet been determined. Gustav Fechner attempted this task a hundred years ago and failed, and no one since his time has succeeded. This is partly because the nature of literary and artistic experience is subjective. One man's art may be ugly or incompre-

hensible to another. It is a truism that beauty is in the eye of the beholder.

It is generally accepted among psychologists that fantasy serves a useful function in the lives of most normal people. It is useful in that it allows an individual to engage in vicarious trial and error and to experience things imaginatively without risking any of the consequences that might be attendant upon any such action in real life. Fantasy is also useful as providing a channel for partial discharge of various impulses. A person can work off some feelings of aggression watching the fights or a football game, and can partially discharge sexual desires by reading or thinking about sex. An employee, for example, who is angered by his employer, can discharge some of the feeling by imagining himself punching the employer in the nose without suffering any of the consequences of actually taking such action. In psychotherapy, people are often encouraged to use fantasy and verbalization of the fantasy as a means of partially discharging otherwise undesirable impulses. Furthermore, fantasy can provide some pleasures, again without requiring any action. It has been well demonstrated that sexual stimulation, even without consummation, is pleasurable.

The existence of curiosity, including sexual curiosity, has been described above as a powerful and normal human motive. Its existence is attested to by the overwhelming success of the recent best selling book by Dr. Reubens, "Everything You Always Wanted to Know About Sex But Were Afraid to Ask". The note of pathos underlying this humorous title should not go unnoticed. It seems tragic that people wishing information about this vital area of human behavior should feel afraid to seek such information. To the extent that

explicit sexual materials meet this normal human need, they are clearly serving a socially useful purpose. While "obscenity" is obviously not the only mode for satisfying this curiosity motive, it may well be the most psychologically available mode for people who are unlikely to read, for example, a medical text book.

Finally, it should be noted that the important social institution of marriage is in considerable jeopardy at the present time. Anything that serves to strengthen and improve the marriage relationship would seem to have obvious social value. Improved communication, including communication about sex, and improved sexual relationships strengthen and improve marriage. The findings of the Commission appear to clearly support the contention that explicit sexual materials stimulate such improved communication and sexual relationships for a considerable proportion of married couples.

6. In view of all the foregoing, it is my considered opinion that the law relating to "obscenity" is excessively vague, ambiguous and incomprehensible. The definition is not one which can be applied by ordinary individuals, including those most concerned, such as booksellers, law enforcement officials and jurors. There is, in fact, no body of knowledge by which experts such as behavior scientists and mental health professionals can make a determination that a given work appeals predominantly to prurient interest of the average person. There is a body of research, mostly contained in the Report of the Commission, which strongly suggests that the definition is one which cannot be met. While, as in all behavioral science research, questions can be raised concerning the methodology and interpretation of individual studies, nevertheless the conclusions of the Commission should be

given great weight. It is important to note that the bulk of the conclusions contained in the studies, based on different methods and sampling of different populations, generally support the findings of the Commission. In view of the substantial agreement among the studies, this must be considered the best available scientific evidence on the issues. Such evidence is especially important in an area where such a high degree of subjectivity is involved and even more so where subjective response is likely to be highly influenced by superstition, myths and unvalidated assumptions.

The charge of excessive vagueness applies also to the question of social value. Social value is an amorphous concept, with regard to which it would be impossible for any individual, be he ordinary or expert, to determine whether it does or does not exist. With regard to specific social value suggested by the courts, it would be equally impossible to say that all of them exist in zero quantity with regard to any given work.

One further point should be made. There is a discrepancy in studies reported and conclusions drawn by a majority of the Commission and the dissenting Commissioners with regard to the attitude of the public concerning obscenity legislation. This discrepancy involves differences in stated attitudes toward obscenity laws. It is a well accepted tenet of behavioral science that the true attitudes of people in regard to a given issue can be more accurately determined by their behavior than by their statements. In this regard, it should be noted that a few years ago in California the people overwhelmingly voted down a strict obscenity law; thus, by their behavior, indicating that they do not favor such laws. This is particularly impressive in view

of the extensive financing of the campaign to pass such a law and its support by the Governor and political leader of the State, in contrast to the almost complete lack of financing and organizational structure in opposition to the proposed law. It has been my own experience in discussion period following lectures to a variety of organizations that an overwhelming majority of people involved in such discussions are either indifferent as to whether or not there are laws regulating obscene matter, or actively in opposition to such laws.

Further, if as some argue, the purpose of obscenity laws is the preservation and fostering of morality, then it should be pointed out that morality cannot exist where there is no choice. Conformity or obedience can exist under such circumstances, but morality consists of making the individual decision to do that which is right in a situation where a choice exists.

/s/ Jay Ziskin
JAY ZISKIN

ORDER DENYING DEFENDANTS' MOTIONS.

Filed: Sept. 21, 1971.

This matter came on for determination on defendants' motions to dismiss, for Bill of Particulars, for discovery and inspection and for inspection of Grand Jury minutes. The court having examined the written motions therein filed by the respective parties, the files and records herein, the cause having been submitted for decision, and the court being fully advised in the premises, it is the decision of the court as follows:

MOTION TO DISMISS THE INDICTMENT

The motion to dismiss the indictment is denied based upon the following:

1. The postal regulation prohibiting pandering advertisements (39 U.S.C. §3008) is not in point as it does not govern the distribution by mail of obscene material. Section 3010 of Title 39, United States Code, as set forth in section 3011(e) of the same title is specifically unaffected by sections 1461 or 1463 of Title 18, United States Code.

2. An indictment framed in the language of the statute is not indefinite or vague and the use of statutory language in an indictment is sufficient. The word "knowingly" as set forth in the indictment sufficiently charges knowledge of all the essential facts as relates to the charge against the defendants.

3. The question of whether the materials cannot as a matter of law be found obscene will be determined by the court at the time of trial or at a pretrial motion properly brought.

4. With respect to counts 15-18, the issue of whether or not the advertisements referred to therein

give information where, why, from whom and by what means a constitutionally protected work might be obtained is a question of fact to be determined at the time of trial.

5. Whether or not the advertisements referred to in counts 2-14 inclusive are not obscene as a matter of law will be determined by the court at the time of trial or at a pretrial motion appropriately brought.

6. Whether or not a crime is committed or whether or not there is a conspiracy to commit a crime, the latter being a separate and distinct offense from the crime itself, is a matter of fact to be determined at the time of trial.

7. Recognizing that a motion to dismiss is not a proper vehicle for attacking the sufficiency of evidence presented to a grand jury, the court is of the opinion that no competent evidence has been presented on behalf of the defendants supporting their allegation that the grand jury was not presented with sufficient evidence.

8. The court finds that the basic statute here involved, to wit, 18 U.S.C. §1461, is constitutional. *U.S. v. Reidel*, 402 U.S. 351 (1971). The indictment is proper on its face and provides the defendants with adequate notice of the charges against them and sufficiently apprises them thereof, that they, through competent counsel, can prepare and bring forth any defenses they may have thereto.

MOTION FOR BILL OF PARTICULARS

With the exception of those orders heretofore made by this court at the hearing herein, the defendants' motion for a Bill of Particulars is denied.

MOTION FOR DISCOVERY AND INSPECTION

Discovery and inspection has been granted defendants herein as heretofore stated by the court at the hearing. The order for discovery and inspection to that extent is a continuing one. All available exhibits to be used in the prosecution of this matter will be pre-marked at pretrial October 6, 1971, and made available to defendants for inspection. Failure to pre-mark available exhibits prior to the date of trial will result in their exclusion by the court at time of trial.

MOTION FOR INSPECTION OF GRAND JURY MINUTES

The government having heretofore consented to make available to defense counsel recorded statements of witnesses before the Grand Jury at time of trial, this matter is moot. Thus, the motion is denied.

DATED: September 21, 1971.

/s/ Gordon Thompson, Jr.
GORDON THOMPSON, JR.
United States District Judge

Copies to:

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Chief Assistant U.S. Attorney

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6922 Hollywood Boulevard
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Louis S. Katz, Esq.
1540 Sixth Avenue
San Diego,California 92101

ORDER DENYING DEFENDANTS' MOTION TO TAKE JUDICIAL NOTICE.

Filed: Oct. 8, 1971.

This matter came on for determination on defendants' motion to determine whether the book referred to in Counts 19, 20 and 21 of the indictment and the advertisement referred to in Counts 2 through 14, inclusive, of the indictment are protected by the Free Speech and Press Provisions of the First Amendment and therefore cannot be found obscene, and defendants' request for the court to take judicial notice. The court having examined the written motions therein filed by the respective parties, the files and records herein, the cause having been submitted for decision, and the court being fully advised in the premises, it is the decision of the court as follows:

MOTION TO DETERMINE WHETHER THE BOOK REFERRED TO IN COUNTS 19, 20 and 21 OF THE INDICTMENT AND THE ADVERTISEMENT REFERRED TO IN COUNTS 2 THROUGH 14, INCLUSIVE, OF THE INDICTMENT ARE PROTECTED BY THE FREE SPEECH AND PRESS PROVISIONS OF THE FIRST AMENDMENT AND THEREFORE CANNOT BE FOUND OBSCENE

a. The advertisements referred to in Counts 2 through 14, inclusive, of the indictment are not found, as a matter of law, to be not obscene.

b. The book referred to in Counts 19, 20 and 21 of the indictment are not found, as a matter of law, to be not obscene.

c. The advertisement referred to in Counts 15 through 18 of the indictment cannot be said, as a matter of law, to not give information as to where, how, and from whom obscene material may be obtained.

DEFENDANTS' REQUEST FOR THE COURT TO TAKE JUDICIAL NOTICE

The court denies the request that it take judicial notice of the case decisions delineated in the defendants' moving papers. The request that the entire files of such cases be produced is also denied. The court has reviewed extensively the case law on the subject of obscenity and is fully able to make the necessary legal determinations in the case before it without specific acknowledgment of the cases, singly or as a group, put forth by the defense.

DATED: October 8, 1971.

/s/ Gordon Thompson, Jr.
GORDON THOMPSON, JR.
United States District Judge

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NOTICE OF MOTION AND MOTION TO CHALLENGE JURY PANEL.

Filed: Oct. 12, 1971.

TO: HARRY STEWARD, United States Attorney; WARREN P. REESE, Chief Assistant U.S. Attorney and LARRY E. BUTCHER, Department of Justice:

PLEASE TAKE NOTICE that this matter will come on for hearing before the Honorable Gordon Thompson, District Court Judge on Wednesday, October 13, 1971 at 9:00 a.m. or as soon thereafter as defendants may be heard on the motion to strike the jury venire on the grounds that the jury as chosen does not comply with the Jury Selection and Service Act of 1968, that the jury panel does not constitute a cross-section of the community and that the jury panel excludes registered voters and is unfavorably weighted with persons who might be prejudiced against the defense in a case of this type.

Dated: October 11, 1971.

GOSTIN & KATZ, INC. &
STANLEY FLEISHMAN
/s/ By: Louis S. Katz,
Louis S. Katz,
Attorneys for Defendants

Filed: Oct. 12, 1971.

COME NOW defendants by and through their attorneys and move this Court for an order pursuant to 28 U.S.C. § 1867 striking the jury venire on the following grounds:

1. Substantial failure to comply with the Jury Selection and Service Act of 1968 (28 U.S.C. 1861 et seq.) in selecting the petit jury. (28 U.S.C. 1867 (d)).

2. There is a systematic exclusion of an identifiable group within the community.

3. The jury wheel does not contain voter registration lists of persons registered in either the most recent state or the most recent Federal general election.

4. The present plan systematically excludes persons 25 years of age and under.

5. The one year residency requirement for jurors required by the act and plan violates a citizen's right to freedom of travel and denies equal protection under the Fourteenth Amendment and the due process clause of the Fifth Amendment.

6. The act's minimum age requirement of 21 years for jurors is a violation of the equal protection of the Fourteenth Amendment.

WHEREFORE, defendants respectfully pray that an order be entered requiring that:

1. The petit jury wheel be augmented prior to the trial by including a sufficient number of persons in those age categories that are not represented or underrepresented on the present jury venire so as to provide a fair representation on the jury of all age groups.

2. That the additions to the jury panel specifically include a proportionate number of persons between the

ages of 21 and 25, said persons having been systematically and completely excluded from the constitutionally infirm jury venire heretofore instituted.

3. That the additions to the jury panel specifically include persons between the ages of 18 and 21 years of age who are registered voters and who have registered since the jury wheel selection was made in 1968.

4. In the alternative that a new jury panel be called forthwith based on the voters' registration lists including persons who have registered to vote from the age of 18, and that such lists be a cross-section of the community.

5. Such other and further relief as to the Court may seem just and fair in order to insure a jury trial for the defendants by a jury of their peers.

Respectfully submitted,

GOSTIN & KATZ, INC. &
STANLEY FLEISHMAN
By: /s/ Louis S. Katz
Louis S. Katz

Dated: Oct. 11, 1971.

AFFIDAVIT OF ALFRED P. KNOLL IN SUPPORT OF MOTION TO STRIKE JURY PANEL.

Alfred P. Knoll, being duly sworn, deposes and says:

1. That he is an attorney at law licensed to practice in the State of California and before this Honorable Court.

2. That between the dates of June 16, 1971 and June 23, 1971 he was coordinator of a group of students who pursuant to Court Order in the above captioned cause were privileged to examine the jury records utilized by this Court.

3. That said group examined the questionnaires returned to the Clerk of this District Court of every juror and potential juror for this District Court since the present jury selection system went into effect.

4. That 10,293 questionnaires to prospective jurors were examined and that 8,993 prospective jurors responded to the questionnaires, and of those, 8,640 listed their date of birth.

5. That according to figures obtained from the Summary of 1970 Census Advance Report, General Population Characteristics for County of San Diego, the following is an accurate age breakdown as to the present population and percentage of population of San Diego County, and those originally placed in the Master Jury Wheel:

Age	Population of S.D. County		The Present Number of Jurors Originally Placed in the Master Wheel	
21	36,277	(2.67%)	0	(0%)
22			0	(0%)
23	85,612	(6.30%)	2	(0.02%)
24			99	(1.03%)
25			129	(1.37%)
26 — 30	172,655	(12.72%)	603	(6.97%)
31 — 34			7,807	(90.51%)
35 & Over	517,787	(38.13%)		
	1,357,854	(59.82%)	8,640	(100%)

6. That the age of those in the Master Jury Wheel is their age as of June 22, 1971.

7. That on May 19, 1971, Affiant had a conversation with William W. Luddy, Clerk of the District Court for the Southern District of California.

8. That in that discussion, Mr. Luddy stated:

A. That those selected for the Master Jury Wheel were picked from voter registration lists of June, 1968.

B. That the Master Wheel has not been updated by names from more recent lists of registered voters—or from any other lists.

C. That the present Wheel will be used until November, 1971.

Further deponent sayeth not.

/s/ Alfred P. Knoll
Alfred P. Knoll

AFFIDAVIT OF STANLEY FLEISHMAN IN SUPPORT OF CHALLENGE TO TRIAL JURY.

FILED: October 13, 1971.

State of California, County of Los Angeles—ss.

STANLEY FLEISHMAN, being first duly sworn, deposes and says: I am one of the attorneys in the above entitled matter and make this Affidavit in support of defendants' challenge to the trial jury.

1. A trial jury plays a unique role in an obscenity prosecution. Indeed, the Government herein, in its memorandum brief on admissibility of other publications contends that a determination of "obscenity" is made by the jury making a subjective moral judgment with regard to the material, without any objective standards. While defendants do not agree with the Government's theory, it is true that the biases and prejudices of a jury play a particularly prominent role in an obscenity case, such as the one at bar.

2. The record in the case at bar demonstrates that there is systematically excluded from the trial jury selected to try defendants all persons who are 18 years of age, 19 years of age, 20 years of age, 21 years of age, 22 years of age, 23 years of age and 24 years of age.

3. *The Report of the Commission on Obscenity and Pornography* has found that older teenagers, including those 18 years of age and over, and those adults aged 21-29, inclusive, have a significantly different attitude towards allegedly obscene material, which attitude is more tolerant and accepting than those of persons 29 years of age and over. In my opinion, it is impossible for the defendants to obtain a fair trial in the case at bar by reason of the systematic and deliberate exclusion of young persons.

/s/ Stanley Fleishman
STANLEY FLEISHMAN

DEFENDANTS' PROPOSED JURY INSTRUCTIONS.

Instruction No. 20.

You should take into account the material found to be not obscene by courts of competent jurisdiction in determining whether or not the evidence proves, beyond a reasonable doubt, that the book and advertisements are obscene.

Instruction No. 26.

The defendants are charged under a general, all-encompassing obscenity statute, not a narrowly drawn one. In short, before you can find the book and advertisements to be obscene, as charged, you must find, beyond a reasonable doubt, that they are obscene, even if they were directed at, and reached, only consenting adults. The fact, if you find it a fact, that there were unsolicited mailings is of no importance in this particular case.

Instruction No. 38.

Congress has passed a law which recognizes that it is not a criminal offense to mail unsolicited sexual advertisements. That law assumes that there will be people who desire to receive such advertisements and people who do not desire to receive them. The law secures the right of all persons, including the defendants, to mail such advertisements to those persons who desire to receive them. With regard to those who do not desire to receive them, the remedy Congress chose was to have the Postmaster General order the mailer to discontinue mailing to those persons who have asked for such protection. You may not find the defendants, or any of them, guilty under the present charge, which is brought

under the criminal law, merely because you may find that the defendants, or any of them, have mailed unsolicited sexually oriented advertisements to persons who did not desire to receive such advertisements.

Instruction No. 54.

The statute here requires that the defendants acted knowingly. This means that the Government must prove, beyond a reasonable doubt, that the defendants had a guilty knowledge. In other words, the proof must show, beyond a reasonable doubt, that the defendants knew that the material here involved patently offended contemporary standards, and went substantially beyond customary limits of candor; and, in addition, knew that the dominant theme of the material, to the average person applying contemporary standards, taken as a whole, appeals to prurient interest; and, in addition, knew that the material was without ideas and utterly without redeeming social importance.

Unless the proof establishes such knowledge of obscenity, beyond a reasonable doubt, the defendants must be acquitted.

Instruction No. 55.

The mere fact alone that a defendant knew the contents of the material, if you should find such a fact, does not for that reason alone, justify an inference that the said defendant knew the material was obscene.

Instruction No. 61A.

If you believe that any defendant was honestly ignorant of the alleged obscenity of the book and advertisements here involved, then that defendant should be found not guilty.

Instruction No. 64.

Even if you find that the defendants, or any of them, knew that the book and advertisements dealt with sex and portrayed sexual activities pictorially, that fact, in and of itself, is insufficient to support a finding that the defendants, or any of them, was aware of the obscene character of the material.

Instruction No. 66.

The statute herein requires proof, in addition to knowledge, of obscenity, of a specific intent to appeal to the prurient interest of the person to whom it is mailed. Unless such specific intent is established, beyond a reasonable doubt, as to the defendants, or any of them, the defendants must be found not guilty.

Instruction No. 67.

Counts 2-21, inclusive, of the Indictment charge a serious crime which requires proof of specific intent before the defendants can be convicted. "Specific intent", as the term implies, means more than the general intent to commit the act. To establish specific intent, the Government must prove, beyond a reasonable doubt, that the defendants knowingly did an act which the law forbids, purposely intending to violate the law.

Instruction No. C-68.

The burden is upon the Government to prove the following ingredients of the offense charged in Count 1 of the Indictment:

1. That each of the defendants knowingly and wilfully entered into a corrupt agreement specifically intending to violate the obscenity law, and

intending to publish, and distribute, the book and advertisements specified in the Indictment with specific knowledge that the said book and advertisements are obscene;

2. That to the average person, the dominant theme of each of the advertisements and book, taken as a whole, substantially exceeds the customary limits of candor, in the Nation as a whole, in the description or representation of sex, nudity or excretion; and, in addition, appeals to the prurient interest of the average person; and, in addition, is utterly without redeeming social importance;

3. That each of the defendants knew that the dominant theme of each of the advertisements and book, taken as a whole, substantially exceeded the customary limits of candor, in the Nation as a whole, in the description or representation of sex, nudity or excretion; and, in addition, appealed to the prurient interest of the average person; and, in addition, was utterly without redeeming social importance;

4. That each of the defendants knew that the book and advertisements were obscene and mailed them intending to appeal to the prurient interest of the average person, in the Nation as a whole;

5. That the defendants, after the formation of the alleged conspiracy, committed the overt acts charged in the Indictment, and that such overt acts were committed in pursuance of the alleged conspiracy and to effect the alleged illegal object of the conspiracy.

Instruction No. 97.

In determining the issue of contemporary community standards, the jury should take into consideration that the United States Supreme Court has held that a person wearing a jacket bearing the words "Fuck the Draft" in a corridor of a courthouse cannot be found guilty of disturbing the peace by alleged offensive conduct and that such expression cannot in any way be deemed erotic.

Instruction No. 102.

The mere fact that the book and advertisements here were sold under commercial auspices, or that defendants made a profit from such sales, does not in any way prove that defendants "pandered" the material. The jury cannot presume or infer pandering from the mere dissemination of the book and advertisements under commercial auspices or for profit.

Instruction No. 109.

The jury is instructed that the Federal Obscenity Statutes do not apply to books, advertisements or other depictions or representations of sex and nudity which are deemed to be vulgar, revolting, offensive or tasteless. If the jury should find that the effect of the book and advertisements involved in the case herein would be to create only such reactions in the average person, then these facts should be considered in determining whether the Government has proved that the book and advertisement are obscene as defined by the Court.

Instruction No. 110.

With respect to the issue of prurient interest, the jury will keep in mind that sex is not obscenity and that the predominant appeal of the book and advertisements here involved must be to the shameful and morbid interest of the average person in the Nation as a whole. If the jury should find that the text of the "Illustrated Report" is a serious work of great importance to a public issue, and that the pictures in the "Illustrated Report" are essential to an understanding of the issues and arguments in the Commission's Report, then the jury would be justified in finding that the material did not appeal to the prurient interest of the average person.

Instruction No. 115.

If the jury should find that the defendants honestly believed that the book and advertisements had social importance and value, or did not appeal to the morbid and shameful interest in sex of the average person, or did not substantially exceed contemporary community standards in the depiction or representation of sex or nudity, then these facts should be considered in determining whether the Government has proven that the book and advertisement are obscene as defined by the Court.

Instruction No. 117.

The jury is instructed that no publisher or distributor of materials or advertisements dealing with sex is an absolute guarantor of the sexual purity of the material he disseminates. A publisher or distributor cannot be found guilty of distributing obscene materials under the Federal law unless it is established beyond a rea-

sonable doubt that he knew the contents of the material and knew that the contents were obscene. Therefore, in the case herein, if the proof shows no more than the material was obscene, then the jury must acquit the defendants because guilty knowledge has not been established. If the proof shows no more than that the defendants knew the contents of the book and advertisements, then the defendants must be acquitted. The proof must show beyond a reasonable doubt not only that the material here involved is obscene as the Court has defined obscenity, but the proof must also show beyond a reasonable doubt that the defendants knew that the material was obscene.

Instruction No. 121.

The jury is instructed that the following types of activities do not constitute "pandering": The display of allegedly obscene publications openly at a newsstand; the mere display and sale of allegedly obscene materials; the references in an allegedly obscene book to other books available from the same publisher containing allegedly prurient materials; lurid pictures and text on the front and back covers of an allegedly obscene book; distribution of publications at a mark-up from $.24 to $5.00 a copy. The jury can only find "pandering" when the evidence establishes beyond a reasonable doubt that the accused openly proclaimed the obscenity of the material he was disseminating. That is, clearly indicated that the accused believed the material substantially exceeded contemporary community standards in the Nation as a whole in the depiction or representation of sex or nudity and appeals to the prurient interest of the average person and is utterly without social importance or value.

DEFENDANTS' PROPOSED QUESTIONS ON VOIR DIRE.

* * *

42. Do you believe that your present views concerning obscenity are influenced by your religious training or beliefs, educational background and experience, political affiliation, upbringing as a child and area or areas in which you lived.

If the answer to the foregoing is in the affirmative, please explain.

43. How frequently do you attend a place of worship?

44. Do you consider yourself to be a deeply religious person?

If the answer to the foregoing is in the affirmative, please tell us how you would classify yourself in this regard.

45. Within the last 12-month period, have you heard any sermons at your place of worship dealing with the subject of obscenity or sexual conduct?

If the answer to the foregoing is in the affirmative, please explain.

* * *

47. Have you, or any member of your family or close friends ever been a member of, made contributions to or associated in any way with the organization known as the Citizens for Decent Literature, or any other organization, having as one of its purposes the control, by law, of obscene material?

If the answer to the foregoing is in the affirmative, please explain.

48. Have you ever read any of the pamphlets or publications put out by the Citizens for Decent Literature, or any other organization, having as one of its purposes the control, by law, of obscene material?

If the answer to the foregoing is in the affirmative, please explain.

* * *

51. Have you ever expressed yourself in favor of, or opposition to, legislation which makes it a crime to distribute allegedly obscene material, even to an adult?

If the answer to the foregoing is in the affirmative, please explain.

52. Do you have any set views on the subject of controlling allegedly obscene matter by criminal law?

If the answer to the foregoing is in the affirmative, please explain.

* * *

56. Has any member of the jury seen, within the last 18-month period, a film which he or she believed to be erotically arousing or sexually provocative?

If the answer to the foregoing is in the affirmative, please list the names of the films.

57. Has any member of the jury viewed, within the last 18-month period, any film which contained language they found offensive, or which dealt with any of the following subjects:

(a) Prostitution;
(b) Lesbianism;
(c) Homosexuality;
(d) Adultery;
(e) Rape;
(f) Bestiality;

(g) Masturbation;
(h) Incest;
(i) Frigidity;
(j) Oral-genital contact;
(k) Impotence.

If the answer to any of the foregoing is in the affirmative, please name the film.

58. List the names of all films viewed by you within the last 18-month period.

* * *

60. Has any member of the jury read, within the last 18-month period, books or magazines which he or she believed to be erotically arousing or sexually provocative?

If the answer to the foregoing is in the affirmative, please list the names of the books or magazines.

* * *

64. Has any member of the jury heard any discussion about any of the following books: ***The Sensuous Woman; The Sensuous Man; Everything You Always Wanted to Know About Sex But Were Afraid To Ask?***

65. Has any member of the jury seen, within the last 18-month period, any television program which he or she felt was offensive because of the sexual depiction therein?

If the answer to the foregoing is in the affirmative, please explain.

* * *

71. Do you have a personal opinion as to whether any particular sexual theme should not be portrayed pictorially or in writing?

If the answer to the foregoing is in the affirmative, please explain.

72. Would you refrain from viewing a film solely for the reason that it was condemned by the Catholic Film Newsletter?

* * *

What is your opinion in this regard?

81. Do you know anyone personally who, to your knowledge, has had any experience with sexually explicit material which they considered to be desirable or undesirable?

Please explain.

* * *

83. Do you believe that the mere fact that sexually explicit material may arouse sexual feelings in an adult is harmful?

MOTION IN ARREST OF JUDGMENT.

FILED: Jan. 11, 1972.

The defendants, and each of them, move the Court for an order arresting judgment herein on the ground that the Indictment does not charge an offense. The grounds for said motion are:

1. The Indictment, and each and every count thereof, fails to state facts sufficient to constitute an offense against the United States.

2. No facts sufficient to constitute an offense against the United States were presented to the Grand Jury which returned each count of the Indictment herein.

3. The Indictment, and each and every count thereof, fails to state facts sufficient to constitute an offense against the United States because the Indictment failed to allege the essential elements of obscenity.

4. Counts 2-18, inclusive, of the Indictment fail to state facts sufficient to constitute an offense under 18 U.S.C. §1461 because the advertisements are regulated exclusively by 39 U.S.C. §3008, which section deals with advertisements which are allegedly pandering.

5. The Indictment, and each and every count thereof, fails to state facts sufficient to constitute an offense against the United States because:

(a) The advertisements referred to in Counts 2-14, inclusive, of the Indictment are, as a matter of law, not obscene, because:

(i) The book "The Illustrated Presidential Report of the Commission on Obscenity and Pornography", referred to in Counts 19-21, inclusive,

of the Indictment, is clearly protected by the free speech and press provisions of the First Amendment and, as a matter of law, is not obscene.

(b) The advertisements referred to in Counts 2-14, inclusive, of the Indictment, are as a matter of law not obscene, but on the contrary are protected by the free speech and press provisions of the First Amendment to the United States Constitution.

(c) The advertisements referred to in Counts 15-18, inclusive, of the Indictment give information as to where, how, from whom and by what means a book, protected by the free speech and press provisions of the First Amendment might be obtained. The advertisements referred to in said counts do not give information where, etc., an obscene book might be obtained.

(d) Since the book, referred to in Counts 19-21, inclusive, of the Indictment are protected by the free speech and press provisions of the First Amendment, and the advertisements referred to in Counts 2-18, inclusive, of the Indictment are similarly protected, it follows that a "conspiracy" to mail the constitutionally protected book and advertisements does not constitute an offense against the United States.

6. The Indictment, and each and every count thereof, fails to state facts sufficient to constitute an offense against the United States because the term "knowingly" as used in the Indictment excluded all guilty knowledge and referred merely to knowledge of contents of the material deposited, or caused to be deposited, in the mails.

7. The indictment, and each and every count thereof, fails to state facts sufficient to constitute an offense

against the United States because 18 U.S.C. §1461, on its face and as construed and applied, violates the free speech, due process and equal protection provisions of the First, Fifth and Sixth Amendments, and the cruel and unusual punishment provisions of the Eighth Amendment, and the right of the People preserved by the Ninth and Tenth Amendments to the United States Constitution.

The Motion is based upon the Indictment herein, the testimony of Larry E. Butcher prior to the impanelment of the Jury, and all the papers and records on file herein.

DATED: This .... day of January, 1972.

STANLEY FLEISHMAN, INC. and
GOSTIN & KATZ
/s/ By Stanley Fleishman
STANLEY FLEISHMAN
Attorney for Defendants

MOTION FOR NEW TRIAL.

Filed: Jan. 11, 1972.

Defendants move the Court for an Order granting a new trial in the interest of justice, because the verdict is against the weight of the evidence and errors of law occurred requiring a new trial in the interest of justice.

This Motion is an alternative motion to the motions filed concurrently herewith pursuant to Rule 29(c) for a judgment of acquittal and pursuant to Rule 34 for a Motion in Arrest of Judgment.[1]

This Motion is based upon all the papers and records on file herein and all of the evidence adduced in the trial and the accompanying Brief in support of this Motion.

DATED: January 7, 1972.

STANLEY FLEISHMAN, INC. and
GOSTIN AND KATZ
/s/ By Stanley Fleishman
STANLEY FLEISHMAN
Attorney for Defendants

[1]In making this Motion, defendants do not waive their claim that they are entitled, as of right, to a judgment of acquittal.

MOTION FOR JUDGMENT OF ACQUITTAL.

Filed: Jan. 11, 1972.

Defendants move for a judgment of acquittal after the discharge of the jury without having returned a verdict on the ground that the evidence is insufficient to sustain a conviction.

This Motion is based upon all the papers and records on file herein and all of the evidence adduced in the trial and the accompanying Brief in support of this Motion.

DATED: January 7, 1972.

STANLEY FLEISHMAN, INC. and
GOSTIN AND KATZ
/s/ By Stanley Fleishman
STANLEY FLEISHMAN
Attorney for Defendants

EXCERPTS FROM REPORTER'S TRANSCRIPT

(Pre-Trial, Trial and Post-Trial Proceedings)

In the United States District Court, Southern District of California.

* * *

Honorable Gordon Thompson, Jr., Judge Presiding.

* * *

United States of America, Plaintiff, vs. William L. Hamling, et al., Defendants. No. 10791-Criminal and No. 11971-Criminal.

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FOLD OUT IS TOO LARGE TO BE FILMED

Please return the coupon below, with your remittance, in the enclosed self-addressed envelope.

Please send . . . . copies. Enclosed is my check or money order in the amount of $ . . . . . ($12.50 each).

I certify, by my signature below, that I am 21 years of age or over and desire the book solely for my private contemplation in the privacy of my home.

SIGNATURE .....

NAME .....
(please print)

ADDRESS.....

CITY.....STATE.....ZIP.....

C
C
POR
D

...agazine **Porno Club** *No. 3,*
...y this was filmed at a "live
...ght club in Copenhagen. There
...similar clubs.

DEFENDANTS' EXHIBITS:		Marked	Received	Withdrawn
A-1	Magazine, "Togetherness"	4367		
A-2	"Flesh and Fantasy"	4367		
A-3	Newspaper Story	4384		
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	Postal Receipt	525		4378
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N	Post Office Money Order Form		585	4410
O	Money Order (Remarked Plaintiff's Exhibit 19-D)		586	
P	Magazine		586	
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R	Magazine—"Questions and Answers"		898	
S	Post Office Report—Donald Schoof			4410
T	Post Office Report—M. Hironaka			4410
U	Book—"Science of Pornography"			4380
V	Book			1104
W	Technical Report, Vol. VI			4380
X	"Report on Obscenity and Pornography"	1385	4413	
Y	Book "Campus Unrest"			4380
Z	Walker Report			4380
AA	Kearny Report			4380
BB	Book—"Challenge of Crime in a Free Society"			4380
CC	Book—"Law and Order Rediscovered"			4380
DD	Book—"To Establish Justice to Insure Domestic Tranquility"			4380

DEFENDANTS' EXHIBITS:		Marked	Received	Withdrawn
EE	Book—"The Obscenity Report"			4380
FF	Book—"The Pentagon Papers"			4380
GG	Playboy Magazine	1401		
HH	Playboy Magazine	1427		
II	Magazine—"Nude Living"		1574	
JJ-1	SIECUS Study Guide No. 1	1838		
JJ-2	SIECUS Study Guide No. 2	1838		
JJ-3	SIECUS Study Guide No. 3	1838		
JJ-4	SIECUS Study Guide No. 4	1838		
JJ-5	SIECUS Study Guide No. 5	1838		
JJ-6	SIECUS Study Guide No. 6	1838		
JJ-7	SIECUS Study Guide No. 7	1838		
JJ-8	SIECUS Study Guide No. 8	1838		
JJ-9	SIECUS Study Guide No. 9	1838		
JJ-10	SIECUS Study Guide No. 10	1838		
JJ-11	SIECUS Study Guide No. 11	1838		
KK	Book—"Sex and Sanity"	2053		4381
LL	Large Photograph	2206		
MM	Article—"Sex Education"	2221		4413
NN	Book—"Modern Demonology"			4381
OO	Getlein's List of Errors in Illustrated Report	2254		4383
PP	Book—"Christianity in Modern Art"	2053		4381
QQ	Magazine—"Animal Love"	2854		
RR	Magazine—"The Advanced Handbook of Swingers"	2854		
SS	Newspaper Article—Evening Tribune 11-10-71	3214		4381
TT-1	Pamphlet—"Facts vs. Fears"	3214		
TT-2	Pamphlet—"Differential Movie Viewing Behavior of the Male and Female Viewers"	3214		
TT-3	Pamphlet—"Extrinsic Religious Values & Prejudice"	3214		
TT-4	Pamphlet—"Imitation & the Learning of Incidental Cues by Preschool Children"	3214		

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EFENDANTS' EXHIBITS:		Marked	Received	Withdrawn
T-5	Pamphlet—"Development of Ethnic Attitudes in Adolescence"	3214		
U	Paper—"W. Cody Wilson Curriculum Vitae"	3214		4384
V	Technical Report Vol. I	3264		4381
W	Technical Report Vol. II	3264		4381
X	Technical Report Vol. III	3264		4381
Y	Technical Report Vol. IV	3264		4381
Z	Technical Report Vol. V	3264		4381
A	Large Chart	3428	3457	4413
C	Magazine—Vol. 2 Photo Illustrated	3579		
D	Magazine—"The Advanced Handbook of Oral Sex"	3579		
E	Paper "Screw" dated August 9, 1971	3579		4381
F	Textbook "Tricks & Techniques of the Selling Writer"	3774		4381
G	Map of San Diego Area	3927		
H	Interview Questionnaire	3929		
	Survey Results	3938		
	Folder of Magazines, Cards & Pictures			4393

APPEAL EXHIBITS

O.	IDENT.	DESCRIPTION
1	October 20, 1971	Transcript Grand Jury Testimony 3-5-71—Roy Urban
2	October 20, 1971	Transcript Grand Jury Testimony 3-4-71—Donald Schoof
3	October 20, 1971	Transcript Grand Jury Testimony 3-4-71—Richard Harte
4	October 20, 1971	Transcript Grand Jury Testimony 3-4-71—Venita Harte
	October 20, 1971	Field Inspector Interview Reports furnished to Defense
	October 20, 1971	Field Inspector Interview Reports (in camera use only)
	October 20, 1971	Case Inspector—Witness Interviews, digest of Field Inspector Reports
	December 8, 1971	Article in November 10 issue of Evening Tribune

VOL. 1.

* * *

[Vol. 1, 41] Mr. Fleishman: At this time, if the Court please, we move that the Government elect as to where the Government is charging the defendants herein with regard to distributing the material, mailing material, which appeals to the prurient interest of the average person or to some other group, and if so, what that other group is.

The Court: I don't think that that is a requirement, that the Government elect, Mr. Fleishman. I don't know of any authority and I have not read any authority that the Government must elect or make an election, one or the other.

I think the Government's position, if I understand it from the voluminous material that has been provided by the Government in this case, is that [Vol. 1, 42] they are proceeding on the theory—I think Mr. Butcher explained it on the witness stand—that parts of it, of the book, may or may not appeal to deviant groups, but parts of it may or may not appeal to other groups; therefore, that it does to heterosexual as well as other persons that are non-deviant groups and I don't know of any rule of law that requires that the Government elect to proceed on either one or the other theory, nor do I know of any rule of law that says they cannot proceed as they are doing here, on both theories.

Mr. Fleishman: If the Court please, I would like to state for the record, we are unable, then, to adequately defend, if we do not know upon what the charge is. It is either one or the other, or if the Government is saying both, I would want the Government to at least advise us now what portion appeals to what

clearly defined sexual deviant group so that we would have an opportunity to defend, if that is indeed what the Government's charge is.

The Court: I don't think that that is required by the Government and I don't think that you are being in any way prejudiced by the proceedings that the Government has followed thus far, and so the motion is denied.

[Vol. 1, 43] Mr. Fleishman: I would like to state that it is neither in the Indictment, your Honor, nor the Bill of Particulars, and today is the first time—the first time that there was even a suggestion made by the Government that the material may appeal to some deviant group.

Again, to make it perfectly clear for the record, we have had no opportunity to defend with regard to any such charge. We do not waive our objections to any such theory of the case, and the evidence along that line, because we have not been advised at all with regard to such matter until this morning, less than an hour and a half ago.

* * *

[Vol. 1, 93] I cannot say that as a matter of law there has been a systematic exclusion of anyone from the panel. The representative figures which Mr. Katz quotes are interesting to the Court. They perhaps would indicate that it is time now, as contemplated by those that approved the plan, that it is time to change the jury master wheel.

* * *

[Vol. 1, 94] Mr. Fleishman: At this time, if the Court please, we respectfully move for a continuance

of the trial until such time as the corrections that the Court indicated were necessary or appropriate are made.

I understand that the Clerk is about to engage in the process of making a more representative list than we now have.

By the Court's own statement we are now at the worst possible time of this jury. The Court has indicated perhaps the time has come, and indeed by the very terms of the Order it could not go much longer.

Within that regard, your Honor, I respectfully call attention to Subsection 4 of 1863 which states that the Chief Judge of the District Court or such other District Judge—the Chief Judge of the District Court or such other District Courts as the plan may provide, may order additional names to be placed in the master jury wheel from time to time as necessary, so that there has really been a default [Vol. 1, 95] on the part of the Chief Judge or/and every District Judge sitting here, once it is acknowledged that there isn't a jury that is able to do a fair job in this case.

And I remind the Court that wherever First Amendment rights are involved, as they are here, the United States Supreme Court has admonished that we must use the most sensitive tool.

Now the most sensitive tool is the best jury we know how to select, the best cross-section, not a jury which is the worst. We are facing the worst possible jury in terms of age when age is crucial to our defense. We don't want a jury made up only of 18 to 25. We do want a jury made up of a fair cross-section, which includes the 18 to 21 and the 21 to 25.

The Court: Excuse me, Mr. Fleishman. I think you misunderstood my comments.

My comments were that perhaps it is time that the jury changes took place. I think Mr. Luddy testified that they will take place in November or something of that nature.

That may well be, but that doesn't affect this case. This case, as I say—albeit that the issues of this case may be different than the issues [Vol. 1, 96] as you point out on the robbery case or something like that—nevertheless, a jury selected in the manner as prescribed by the statute and prescribed by the general plan, there is no reason for this Court to think that such a jury could not just as capably judge this case. It may not be the most perfect that the defense would want; I don't know, because I am not that familiar with what jurors think in obscenity cases, having never tried one before. I must defer to your position there.

However, I feel that this is a representative group. I have impaneled juries here now for a year at the rate of about nine a month and inquired of 28 jurors at a time of those nine-per-month jury trial, and it seems to me that there is not only a cross-section of age and color and residence, it seems that it is a well-rounded, well-chosen, well-selected, representative group of the District.

Mr. Fleishman: Your Honor, there is a systematic exclusion necessarily of those 21, 22, 23 and most of the 24. Those are systematically excluded, so they are not represented at all, nor do we have any representation of the 18 to 21, which is a somewhat different situation. But at [Vol. 1, 97] least those are plainly eligible under the law under any standard and every standard. Those 21, 22 and 23 and most of the 24 are excluded by reason of two things:

1) The failure of the Judges in this District to freshen the jury, as they have the obligation to do, really, to keep the jury panel as a fair cross-section.

But our point is different at this stage, your Honor. We are asking your Honor as a matter of due process of law and guarantee of the First Amendment to try to continue this case for a reasonable period of time, and it can't be too long, because Mr. Luddy says the jury is going to be freshened, a whole new thing is going to go into effect in November. We are now on October 13, so we ask for a very short continuance, no longer than is necessary to bring in the group that is now totally excluded.

I am talking particularly about the 21, 22, 23 and most of the 24. I also believe that as a matter of due process we are entitled to the 18 to 21, but if we are wrong on the 18 to 21, we are absolutely right on the 21, 22, 23 and most of the 24, and that can be corrected easily, your Honor—easily and speedily, because all you have to do is continue the [Vol. 1, 98] case for a short period of time.

This is worse, really, than a situation where there is some prejudice by reason of the newspaper publicity where the courts have indicated that there ought to be a continuance to let the evil be dissipated, because there there is a question of how do you ever dissipate it.

We know that the evil found in this panel now will be corrected in part, because starting with the new master wheel we are going to have at least 21's. I hope we are going to have the 18's, but I know we are at least going to have some 21's.

It seems to me, your Honor, that it would be arbitrary, it would be a denial of due process of law, as I say, to deny the continuance in light of the record made here and particularly in light of the fact that the Commissioner and the Clerk is about to go about correcting a grievous situation.

Thank you.

The Court: All right.

I have ruled, Mr. Fleishman.

Mr. Fleishman: You haven't on the motion for continuance, your Honor. I am now moving for continuance.

The Court: All right, I will rule on the motion to continue and the motion is denied.

VOL. 3.

[Vol. 3, 403] WILLA B. REINIGER,

* * *

DIRECT EXAMINATION

* * *

BY MR. McCORRISTON:

Q Mrs. Reiniger, I will ask you if you can identify what we have marked as Government's Exhibit 2?

A Yes, I can identify this.

Q How can you identify it, ma'am?

[Vol. 3, 404] A By the contents of the envelope and also because I have initialed it on the outside under the date of January 21, 1971, when it was brought to me by the United States Postal Inspector.

Q How did these materials originally come into your possession?

A They came into my possession by first-class mail in my post office box.

Q On or about what date did you receive them?

A Between the 15th of January and the 21st, somewhere in there. I don't know the exact day.

Q Okay. Do you recall what company, if any, sent those materials to you?

A Library services.

Q Have you ever solicited any material from library services?

* * *

[Vol. 3, 405] A I have never ordered anything from this company.

Q From Library Services?

A No.

Q Have you ever ordered or solicited any materials of the nature which you have before you?

A No.

* * *

CROSS-EXAMINATION

BY MR. FLEISHMAN:

Q Mrs. Reiniger, did I understand that the Postal Inspector brought you an envelope that you then initialed; is that correct?

A That I initialed at his request when he brought it to me. I had previously received it and turned it over to the postmaster of our post office, that I did not care to receive such mail in my box.

Q And you then signed at the post office, did you, a complaint saying that you didn't want to receive any such mail?

A I did.

[Vol. 3, 406] Q And you never have received any further mail from this company, have you?

A Not from this company, no.

* * *

[Vol. 3, 418] HELEN LYNCH

* * *

DIRECT EXAMINATION

BY MR. McCORRISTON:

* * *

Q Mrs. Lynch, I am now going to ask you if you can identify what we have marked for purposes of identification, government's 4.

A Yes, I can identify it.

Q How can you identify that, ma'am.

A I have my initial on the material and it is the same material that I received.

Q How did the materials before you originally come into your possession?

[Vol. 3, 419] A They arrived in the mail.

Q To the mailing address you have previously stated?

A Yes, sir.

Q Did you recall what company, if any, sent those to you?

A Library Service, Inc.

Q And on or about what date did this occur?

A About the middle of January.

Q Mrs. Lynch, have you ever requested from Library Services or solicited from them, any type of material?

A No, Sir.

Q And have you ever solicited any material of the nature that is before you now?

A No, sir.

* * *

[Vol. 3, 420] CROSS-EXAMINATION

BY MR. FLEISHMAN:

* * *

[Vol. 3, 421] Q Tell us the circumstances under which you initialed and dated the envelope?

A The material was received and at the time that I received the material, I called the post office department to determine what I could do to not receive this type of mail again and to determine what I should do with it. They informed me that they would send a prohibitory order for me to sign and that I should return this material with this order, which I did. I completed the order and signed it and returned it to the post office.

Q And thereafter, you never received any further mail from Library Services, did you?

Mr. McCorriston: Object to that for relevancy.

The Court: Overruled.

You may answer.

The Witness: No, I have not received any further mail from Library Services.

* * *

Vol. 3, 422] Q Is there any place on that material or anything connected with that envelope, did you see the name, "Shirley Wright"?

A No.

Q David Thomas—

Mr. McCorriston: We will stipulate none of those names appear on any of our advertisements and save counsel time.

[Vol. 3, 424] JAMES A. LYNCH,

* * *

Direct examination

BY MR. McCORRISTON:

* * *

[Vol. 3, 425] Q Can you identify the company that sent that mail to your house?

A Yes, Library Services, Inc.

Q Mr. Lynch, have you ever solicited any material from any Library Services, Inc.?

A Not to my knowledge.

* * *

CROSS-EXAMINATION

* * *

[Vol. 3, 426] BY MR. FLEISCHMAN:

Q Mr. Lynch, did you make an application to have your name withdrawn from any mailing list that Library Service might have and not receive any further mail from Library Service?

A My wife made such an application on my behalf, yes.

* * *

Q Mr. Lynch, you have before you what has been marked Defendant's F for identification. Is that [Vol. 3, 427] the application that was made on your behalf?

A That is correct.

Q Whose name is listed there?

A James Lynch.

Q Is that your signature?

A That is my wife's signature, done with my knowledge and consent.

Q And since making that application, not to receive any further mail from Library Service, have you

ever again received any mail of any kind from Library Service?

A Not to my knowledge.

* * *

[Vol. 3, 428] CHESTER H. PRIBBLE,

* * *

[Vol. 3, 429] DIRECT EXAMINATION

BY MR. BUTCHER:

Q Mr. Pribble, I will hand you what has been marked Government's Exhibit 15 for identification and ask you to identify it, if you can, sir.

[Vol. 3, 430] A Yes, Sir, I can identify it.

Q Has this material ever before been in your possession?

A Yes, sir.

Q Before today?

A Yes, sir.

Q About when in point of time was that?

A About the 15th or 16th of January, 1971.

Q Do you recall the name of the company whose name appeared on the material contained in the mailing envelope?

A Yes, sir.

Q And what was that name?

A Library Service, Inc.

Q Had you ever had any business or social or any other type contact with Library Service, Inc.?

A No, sir.

Q Did you ever solicit this material from Library Service, Inc.?

[Vol. 3, 431] A No, sir.

* * *

CROSS-EXAMINATION

BY MR. FLEISCHMAN: [SIC]

* * *

[Vol. 3, 433] Q And will you tell us the circumstances under which you initialed and dated the said envelope?

A I dated this at the time when the postal inspector came to my home.

Q What Postal Inspector?

A The Postal Inspector from the Regional Area of Altoona, Pennsylvania.

Q What is his name, if you know?

A A Mr. Hall.

Q Do you know the circumstances under which he happened to come to your home?

A I filed a complaint after receiving it.

Q And the complaint was, you stated, you did not want to receive any further mail from Library Services: Is that the fact?

A Yes, sir.

Q And it is a fact, is it not, that you never received any other mail from Library Services thereafter, did you?

A I have not.

* * *

[Vol. 3, 435] MORRIS MENDELSOHN,

* * *

[Vol. 3, 436] DIRECT EXAMINATION BY MR. McCORRISTON:

* * *

Q I am now going to show you an envelope marked Government's 16 and ask you if you can identify it, sir?

A Yes, I can.

Q How can you identify those materials?

A This was sent to me in the mail. I can identify it by its appearance and also by the fact that I have initialed it and dated it.

Q Do you recall what company, if any, sent those materials to your home?

A Yes. Library Service.

Q Did you ever solicit those materials or [Vol. 3, 437] any other materials from Library Services?

A No.

* * *

CROSS-EXAMINATION

BY MR. FLEISCHMAN: [SIC]

* * *

[Vol. 3, 438] Q Now, I take it that you also asked the Post Office to issue a Prohibitory Order so that you would not receive any further mail from Library Services; it that correct?

A Yes.

Q And it is a fact, is it not, that you never again received any mail of any kind from Library Services after making that application, that is the fact, is it not?

A Yes.

* * *

[Vol. 3, 442] Mr. Fleischman: While we are here, I neglected to ask the prior witnesses on the stand their ages. May it be stipulated before they leave, so I don't have to call them back, that all of them—

Mr. Butcher: We stipulate they are all adults.

Mr. Fleischman:—That they were all adults. I had missed asking until I go—

The Court: Do you want to stipulate before the jury or just on the record here.

[Vol. 3, 443] Mr. Fleischman: I would like to stipulate before the jury, if the Court please, with regard to the witnesses.

The Court: They can observe it.

Mr. Fleischman: I will take it for the record; the record satisfies me, Your Honor.

Mr. Katz: But there is a stipulation on the record that they are all adults.

The Court: Absolutely.

* * *

[Vol. 3, 445] WILLIAM J. DAMMANN

* * *

DIRECT EXAMINATION

BY MR. BUTCHER:

* * *

[Vol. 3, 446] Q Mr. Dammann, I will hand you what has been marked—

Mr. Butcher: If I might approach the witness—

The Court: Yes.

Q —Government's Exhibit 8 and ask you to identify it if you can.

A Yes, sir.

Q Have you ever had that material in your possession before?

A Yes, sir, I received it in the mail.

Q About what time?

A Well, I think it was about the 16th of January. As I recall, it was on a Saturday and I turned it in to the Post Master on Monday.

Q Do you recall the name of the company that appears on the advertising brochure or on the materials enclosed in that exhibit?

A No, I couldn't have until just now seen it in there. I had forgot the name.

Q All right. Having seen that what was the name you saw?

A Library Services.

Q Let me ask you this, have you ever solicited [Vol. 3, 447] from Library Services that advertisement or any other advertisement from that company of that nature?

A No, sir.

* * *

CROSS-EXAMINATION

BY MR. FLEISHMAN:

* * *

Q After you received the brochure, you had occasion to initial the outer envelope and date it, did you not?

A Yes, sir.

Q And was that when the Postal Inspector got your initials and the date when you were making an [Vol. 3, 448] application for a Prohibitory Order, is that what happened?

A This was a couple of months later, yes, sir.

Q Well, if you look at it I think you will find it wasn't that old.

A No, it is dated the 18th. That was the date I turned it in.

Q Yes. Then what happened? On the 13th, is that when you initialed it?

A I initialed it and I marked it 1/18/71. That was the date that I turned it in to the Post Master.

Q And when you turned it in you turned it in for the purpose of getting an order asking Library Services not to send you any more mail, isn't that right?

A Well, as I understand it, that was the procedure to follow, if you didn't want any more of this type of mail and I gave it to the Post Master.

* * *

[Vol. 3, 450] Q And the fact is, is it not, Mr. Dammann, that thereafter you never received any mail of any kind from Library Services, isn't that the fact?

A That is true.

* * *

[Vol. 3, 452] DENNIS C. LINDELL

* * *

[Vol. 3, 453] Q Mr. Lindell, I hand you Government's Exhibit 5 for identification and ask you to identify it if you can.

A Yes, I can identify it.

Q Has that material ever been in your possession prior to today?

A Yes, it has.

Q Do you recall the name of the company appearing on the contents of that Exhibit?

A Library Services.

Q Did you solicit that piece of material from Library Services?

A No, sir.

* * *

CROSS-EXAMINATION

BY MR. FLEISHMAN:

[Vol. 3, 454] Q I take it when you received the advertisement you got in touch with the Post Office Department, did you?

A Yes, sir.

Q And you also asked for an order from the Post Office Department requesting that Library Service not send you any further mail, isn't that a fact?

A Yes, sir.

Q And thereafter you never received any other mail from Library Service of any kind, did you?

A No, sir.

* * *

[Vol. 3, 455] ELSA MEYERHOFF

* * *

[Vol. 3, 456] Q Mrs. Meyerhoff, Government's Exhibit 10 has been placed before you.

A Yes.

Q I will ask you to identify it if you can.

A Yes, I can.

Q Has that piece of evidence ever been in your possession prior to today?

A Yes.

Q When might that have been?

A In January of '71.

Q And where did you find that piece of evidence originally?

A In my mailbox.

* * *

[Vol. 3, 458] Q Mrs. Meyerhoff, did you personally ever solicit that material from the Library Services?

* * *

A No. No, I did not.

* * *

CROSS-EXAMINATION

BY MR. FLEISHMAN:

* * *

[Vol. 3, 459] Q Did you file an order—did you ask the Post Office Department to ask Library Services not to send you any further mail?

A. That is right.

Q You did?

A Yes.

Q Did you sign it?

A Yes.

* * *

[Vol. 3, 461] Q My question is, do you recall receiving any more mail from Library Services?

A No, I do not.

* * *

[Vol. 3, 463] ALFRED MEYERHOFF

* * *

[Vol. 3, 464] Q (BY MR. BUTCHER) Mr. Meyerhoff, have you ever heard of a company called Library Services, Inc.?

A Yes, I have.

Q Have you ever solicited anything at all from that Company?

A No.

* * *

CROSS-EXAMINATION

BY MR. FLEISHMAN:

Q Mr. Meyerhoff, after the application to the Post Office Department was made requesting Library Service not to send you any further mail, [Vol. 3, 465] do you recall receiving any further mail from Library Services?

A I am not sure of that.

Q You don't have any recall of having seen anything from Library Services?

A I can't tell.

Q I take it what you are saying is you received some further mail but you don't know from whom you received it; is that the fact?

A That is correct.

Q When you received this further mail did you turn it in to the Post Office Department?

A No.

* * *

[Vol. 3, 467] VICTOR N. LA MARIE

DIRECT EXAMINATION

BY MR. BUTCHER:

* * *

[Vol. 3, 468] Q But insofar as that particular piece of evidence is concerned, is this the first time that you have ever seen that particular piece of evidence?

A No, I seen it in January.

January of when, sir?

A '71. Well, I got it just prior to January—I mean January 16 of '71.

Q Where did you find that particular piece of evidence?

You say you got it.

A It was in my mailbox.

Q All right.

Did you open it yourself?

[Vol. 3, 469] A I did.

Q Have you ever heard of a company called Library Service, Inc?

A No, I never did.

Q Have you ever solicited anything at all from Library Service, Inc.?

A Not to my knowledge, no. I know, not Library. I remember that name, no.

* * *

CROSS-EXAMINATION

BY MR. FLEISHMAN:

* * *

[Vol. 3, 470] Q I take it that you also requested the Post Office Department to ask Library Services not to send you any more mail, is that correct?

A I did.

Q And Library Services has complied; you have not received any further mail from them at all, have you?

A Not from Library Service.

* * *

[Vol. 3, 471] ROBERT REINKE

* * *

DIRECT EXAMINATION

BY MR. McCORRISTON:

* * *

[Vol. 3, 472] Q Mr. Reinke, I am going to ask you if you can identify what we have marked as Government's Exhibit 17. Can you identify that, sir.

A Yes.

Q How can you make that identification?

A It bears my initials. All three parts of the document—Exhibit—bear my initial and a date which I wrote on there.

Q How do those materials come into your possession?

A They were received through the United States Mails at my home.

Q At the address you have previously stated?

A Yes, that is correct.

Q And sir, can you recall from your independent recollection what company you received those materials from?

* * *

[Vol. 3, 473] A Library Services.

* * *

CROSS-EXAMINATION

BY MR. FLEISHMAN:

Q Mr. Reinke, I take it that you asked the Postal Department to ask Library Service not to send you any more mail, is that correct?

* * *

A Yes, I did.

Q And thereafter you never received any further mail from Library Service, did you?

[Vol. 3, 474] A That is right. I have no present recollection of receiving any other mail from Library Services.

* * *

[Vol. 3, 477] CHARLES C. HAZLETT

* * *

[Vol. 3, 478] DIRECT EXAMINATION

BY MR. BUTCHER:

* * *

Q (BY MR. BUTCHER) I hand you Government's Exhibit 3 for identification and ask you to examine it.

A Yes, sir.

Q Mr. Hazlett, have you ever had that material in your possession prior to today?

A When I got it.

* * *

[Vol. 3, 479] Q Mr. Hazlett, are you familiar with the company called Library Service, Inc.?

A No, sir. The only time I have ever seen it was right here.

Q Have you ever ordered anything either this particular item or any material of any kind from Library Services in the past?

A No, sir.

* * *

CROSS-EXAMINATION

BY MR. FLEISHMAN:

* * *

[Vol. 3, 480] Q Whose idea was it to ask the Post Office Department to ask Library Services not to send you any further mailings?

A It was mine.

Q And after you asked the Post Office Department to make that request of Library Services, so far as you know that was fully complied with, isn't that right?

A No, sir.

* * *

Q Well, just a minute. Did you ever see any mail from Library Services after that—you, personally?

[Vol. 3, 481] A No, sir. I haven't.

Q You did not.

A No.

* * *

[Vol. 3, 483] ENOCH L. JAMES

* * *

DIRECT EXAMINATION

* * *

[Vol. 3, 484] Mr. Butcher: If I might approach the witness.

The Court: Yes.

Q Mr. James, I will hand you Government's Exhibit 7 for identification and ask you to examine it, please. Have you ever seen that advertisement, that evidence prior to today?

A Yes, I saw it when I received it and I saw it when the Inspector came to see me with it.

Q All right. You received it, you say. You received it how?

A In the mail box, U.S. Mail.

* * *

[Vol. 3, 485] Q Had you, prior to the receipt of this advertisement, ever received or solicited anything including that advertisement or anything else from Library Service, Inc.?

A No.

* * *

CROSS-EXAMINATION

BY MR. FLEISHMAN:

Q Mr. James, after you received the envelope containing the advertisement, tell us what you did, please.

A I went to the Post Office and obtained a form. I don't know the number. I took it home with me and filled it out and returned it to the [Vol. 3, 486] Post Office with this material.

Q And in the form you asked the Post Office Department to ask Library Services not to send you any more mail, is that the fact?

A That would be correct, yes.

Q And you never received any further mail from Library Services thereafter, did you?

A Not to my knowledge.

* * *

[Vol. 3, 488] DAVID L. SNELL

* * *

DIRECT EXAMINATION

BY MR. McCORRISTON:

* * *

Q Mr. Snell, at this time I will ask you if you can identify the envelope we have previously marked as Government's Exhibit 9.

A Yes, sir.

Q How can you make that identification, sir?

A By the initials and the date that I put on here of January 19 of '71.

Q Sir, do you recall the name of the company that sent you that mail?

[Vol. 3, 489] A Library Services.

Q Sir, at that time or any other time had you solicited anything from that company?

A I have not.

* * *

CROSS-EXAMINATION

BY MR. FLEISHMAN:

Q Now did you go to the Post Office Department also after receipt of the advertisement and ask that you get an order to the Library Services that you should not receive any more mail from them?

A That is correct.

Q And thereafter you did not receive any more mail from Library Service?

A I did not.

* * *

[Vol. 3, 491] ALLAN CREPEAU

* * *

[Vol. 3, 492] DIRECT EXAMINATION

By MR. McCORRISTON:

* * *

Q All right, Mr. Crepeau, I will hand to you an envelope we have marked for identification as Government's Exhibit Number 11 and ask you if you can identify that.

A I can.

Q How can you make that identification?

A Well, a number of ways. First, it is addressed to me and I initialed it. This is my initial, on January 15, 1971.

I specifically remember the headline, *The Illustrated Presidential Report of the Commission on Obscenity* and the return address on the envelope, [Vol. 3, 493] Library Service, Inc.

Q Sir, did you solicit that particular advertisement from Library Services, Inc.?

A I did not.

* * *

CROSS-EXAMINATION

BY MR. FLEISHMAN:

* * *

Q After you received the mailing I take it that [Vol. 3, 494] you asked the Post Office Department to ask Library Service not to send you any more mail, is that right?

A I took this piece of literature to the Post Office Department, asked them what I could do to keep it from coming into my house, and they gave me a form which I completed.

Q And that form, to the best of your recollection, requested the Post Office Department to ask Library Service not to send you any more mail, isn't that the fact?

A To the best of my recollection.

Q And the fact is, is it not, that thereafter you never again received any mail from Library Service?

A Not to my knowledge—recollection.

* * *

[Vol. 3, 496] A. KENNETH SIVITZ

* * *

DIRECT EXAMINATION

BY MR. McCORRISTON:

* * *

[Vol. 3, 497] Q All right, Mr. Sivitz. I am going to show you the envelope we have previously marked for identification as Government's 12 and ask you, sir, if you can identify that.

A Yes, I can.

* * *

Q And how did you first receive that into your possession?

A Through the mailbox.

[Vol. 3, 498] Q Through the United States mails?

A United States mail.

Q Sir, do you recall what company sent that piece of mail to you?

A Library Services.

Q Did you solicit that mail from Library Services?

A I did not.

* * *

CROSS-EXAMINATION

BY MR. FLEISHMAN:

* * *

Q When you received this mail you asked the Post Office Department to ask Library Service not to send you any more mail, is that the fact?

A I signed a prohibitory notice. I did.

Q That Prohibitory Notice was asking the Library not to send any more mail, is that right?

A That is correct.

Q And in fact you never received any more [Vol. 3, 499] mail from Library Service, isn't that correct?

A I have not.

* * *

VOL. 4.

[Vol. 4, 665] RICHARD HARTE,

* * *

DIRECT EXAMINATION

BY MR. BUTCHER:

Q. Mr. Harte, where is your residence, sir?

A. My home residence, you are speaking of?

Q. That is correct.

A. 10545 McBloom Street, Sunland, California.

[Vol. 4, 666] Q. Is this a suburb of Los Angeles?

A. This is a suburb of Los Angeles, yes, sir.

Q. Are you presently employed?

A. Self-employed, sir.

Q. What is the name of your firm?

A. Academy Addressing and Mailing.

Q. What is the address of that firm?

A. 12117 Vanowen, North Hollywood.

Q. And very briefly, would you explain to the members of the jury what the nature of the business of Academy Addressing and Mailing Service is.

A. We perform a service for people who wish to have commercial mailings or mailings of any type done. That is inserting letters, brochures, or stuff like that into envelopes.

Q. Included in that service, does your firm ever have occasion to mail out adult sexually oriented material?

A. Well, I guess you could—yes, in a roundabout sort of way. We don't exactly mail books or anything like that; we haven't. We just mail brochures and stuff like that, advertising books for sale.

Q. What would be the percentage?

A. Oh, no more than five or ten percent of my actual business.

[Vol. 4, 667] Q. That would be what? The sexually oriented or the other?

A. Well, I guess you would call it sexually oriented material.

Q. Mr. Harte, are you familiar with a company called Regent House?

A. Yes, sir.

Q. And where are they located?

A. I couldn't give you the address. I know it is on Varner Street in North Hollywood.

Q. North Hollywood?

A. Yes, sir.

Q. Do you know anyone at Regent House named Bernard Lieberman?

A. I know the name of Lieberman now. I never knew it before. I knew it only as Bernard.

Q. Bernard?

A. Bernie, as I called it.

Q. Did you at any time in the month of January '71—did you ever have a conversation with a person you know as Bernie?

A. Yes, Bernard called me on the phone.

* * *

[Vol. 4, 696] Q. Subsequent to the receipt of that telephone [Vol. 4, 697] conversation with Bernard Lieberman, did you have occasion to perform a business service of any kind for Regent House, Inc.?

* * *

Q. Did your firm perform any service?

A. Yes, we did.

Q. What was that service?

A. Insertion of brochures and return envelope into an outside envelope and sealed.

Q. Approximately how many were there, sir?

A. Roughly, to my knowledge, now, 55,000-58,000.

Mr. Butcher: If I might approach the witness?

The Court: Yes.

BY MR. BUTCHER:

Q. I hand you what has been marked Government's Exhibit 2 and contents and ask you to examine it for a moment and the contents—I ask you to examine it for a moment, and the contents, please, these some 50-55 or 58,000 advertisements, whatever your figure was. I ask you to closely examine Exhibit 2-A and tell me if that [Vol. 4, 698] was or was not identical to those advertisements?

* * *

The Witness: Yes, sir.

BY MR. BUTCHER:

Q. Mr. Harte, after your firm had stuffed—I guess —Is that the term?

A. Yes, sir.

Q. Exactly what is that, please?

A. Well, we have a machine they call a Follsberg Inserter. It stuffs pieces of mail into an envelope and seals it.

Q. Did your firm have occasion to affix postage of any kind—

A. Yes, sir.

Q. (Continuing)—to the exhibits and did you use your own firm's meter head for that?

A. No, sir.

Q. Where did you get the meter head?

A. The meter head was brought at the same time that the brochures and the envelopes and the rest of the stuff was brought over and used on my machine.

[Vol. 4, 699] Q. Okay.

Do you have any first-hand knowledge as to who owned the meter head?

* * *

The Witness: Yes.

* * *

Q. Who owns the meter head, sir?

A. Regent House.

Q. Now, then, did you then deposit—well, let me ask you, have we finished the operation? They are stuffed and affixed postage.

Now did you then deposit the items in the mail yourself?

A. No, sir, I did not.

Q. Do you know what happened to the items?

A. Yes, sir.

[Vol. 4, 700] Q. Did someone come and get them?

A. Yes, sir, they did.

Q. And you probably have no idea of what happened after that?

A. No. Once they leave my place, that is it.

Q. Fine. Thank you.

One last question, Mr. Harte: What about payment for this particular operation? Do you know anything about that?

A. My wife takes care of that service.

Mr. Butcher: Thank you.

Your witness.

CROSS-EXAMINATION

BY MR. FLEISHMAN:

Q. Mr. Harte, you have been named as a co-conspirator in this case. You were aware of that, is that correct?

A. Yes, sir.

Q. And was any promise made to you in connection with the testimony you are giving here by the Government—any promise given by the Government?

A. No, sir.

Q. Did you ever enter into any agreement with any of the other persons named herein to enter into an [Vol. 4, 701] agreement to do something that you thought was unlawful?

Mr. Butcher: Objection as being immaterial, your Honor.

The Court: Sustained as to what he thought.

BY MR. FLEISHMAN:

Q. Have you ever met Mr. Hamling?

A. No, sir.

Q. Have you ever had any conversations with him?

A. No, sir.

Q. Of your own knowledge you don't know anything about who runs Library Services, do you?

A. No, sir, I don't.

Q. Or Reed Enterprises?

A. No, sir.

Q. Or Greenleaf Classics?

A. No, sir.

Q. You never had any agreements with them at all, did you?

A. No way.

Q. No discussions?

A. No agreements, no, sir.

Q. Now, as I understand it, the person that you dealt with in connection with the brochure is a person who you knew by the name of Bernie, is that right?

[Vol. 4, 702] A. Yes, sir.

Q. You didn't know his last name even at the time that you—

A. (Interposing) No, sir.

Q. (Continuing)—did business with him, is that right?

A. No, sir.

* * *

[Vol. 4, 708] Q. Now at the present time do you know what, if any, position this Bernie Lieberman has with Regent House?

A. Yes, sir.

Q. What is his position, do you know?

A. Warehouseman, as I found out recently.

Q. Warehouseman?

A. Warehouseman.

* * *

CROSS-EXAMINATION

BY MR. KATZ:

Q. Mr. Harte, looking at the four people sitting at the defense counsel table, have you ever seen any of them before you came to court?

A. No, sir, I have not.

Q. Have you ever had any dealings with Earl [Vol. 4, 709] Kemp?

A. No, sir.

Q. Shirley Wright?

A. No, sir.

Q. David Thomas?

A. No, sir.

* * *

[Vol. 4, 710] Q. In connection with the particular mailing where you have been shown Government's Exhibit 2, besides the material that Mr. Lieberman spoke to you about and the material that Regent House sent over to you, has anyone else sent you any of that material to be mailed out?

A. This specific one, sir?

Q. Yes.

A. No.

Q. If I understood your testimony, Mr. Harte, as far as the Government's 2 and the advertisement [Vol. 3, 711] advertising the illustrated Presidential Report of the Commission on Obscenity and Pornography, your only dealings regarding that mailing and that stuff was with Regent House, is that right, sir?

A. Yes.

* * *

[Vol. 4, 712] VENITA HARTE,

* * *

DIRECT EXAMINATION

BY MR. BUTCHER:

Q. Mrs. Harte, are you affiliated in any way with Academy Addressing and Mailing Service?

A. I am.

Q. You saw the previous witness testify. Is that your husband?

A. It is.

Mr. Butcher: If I might approach the witness?

The Court: Yes.

BY MR. BUTCHER:

Q. I show you what has been marked Government's Exhibit 25 for identification and ask you to examine it [Vol. 4, 713] for a moment, please. Would you briefly describe what it is generally.

* * *

Q. Mrs. Harte, you have had occasion to [Vol. 4, 714] examine that document in front of you, bearing Exhibit No. 25, have you not?

A. Yes, sir.

Q. Generally, describe what it is.

A. It is my invoice for services performed.

Q. Did you personally prepare that document?

A. I did.

Q. The amount shown on the document, total billing?

A. $541.15.

Mr. Katz: We can't hear the witness or the counsel.

The Witness: $541.15.

The Court: What number Exhibit is that, Mrs. Harte?

The Witness: 25.

Mr. Katz: What is that exhibit number?

The Court: G-25, Government's 25.

BY MR. BUTCHER:

Q. Mrs. Harte, do you have any firsthand knowledge of the nature of the service your company performed in order to warrant that $541.15?

A. We do a complete mailing service.

Q. And who was the person for whom that service was performed?

A. That was billed to Regent House.

[Vol. 4, 715] Q. In what city?

A. North Hollywood.

Q. Did you ever see the materials upon the completion of the service you had performed such as the stuffing of the envelopes, the affixing of the postage?

A. I did.

Q. Did you personally deposit them in the mail?

A. I did not.

* * *

Q. Let me ask you this. Are they in your concern this day?

A. No, sir. They were picked up.

* * *

[Vol. 4, 717] CROSS-EXAMINATION

BY MR. KATZ:

* * *

[Vol. 4, 719] Q. Have you ever had any business dealings with a man named Earl Kemp?

A. No, sir.

Q. Shirley Wright?

A. No, sir.

Q. David Thomas?

A. No, sir.

[Vol 4, 720] Q. To your knowledge in connection with the particular billing you have in front of you, which is Government's Exhibit 25, did you have any business dealings with Reed Enterprises, Greenleaf Classics or Library Service?

A. No, sir.

Q. Then the only contact you had was with Regent House, is that correct?

A. Yes, sir.

Q. And they paid you for the services you performed?

A. That is right.

Q. And aside from the fact that someone—I will go back.

Were you aware that someone had called you to tell you they were going to send this material over?

A. They had contacted my husband.

Q. All right. And the person who contacted your husband, did that person ever talk to you or did you have any conversation with anyone at Regent House regarding delivery of this material?

A. No, not until it came in. When the material arrived, I mean—that this is the place it was from, my husband told me.

Q. I am sorry, I didn't make it clear.

[Vol. 4, 721] Did you have any personal contact with anyone at Regent House regarding this mailing?

A. I don't believe so, no.

Q. Just so we are clear, you handled this the same as you have handled all other mailing that came into your service to operate, is that right?

A. Yes, sir.

Q. And when the mailing was finished do you know how the people at Regent House or someone was notified that it was completed?

A. They were probably called and said it was completed.

Q. And you don't recall whether you called them or your husband?

A. My husband did, I believe.

Q. So then you personally had no contact with anyone from Regent House or from any of the people that I have mentioned except to send them a bill and get a check back, is that right?

A. That is right.

* * *

VOL. 5.

[Vol. 5, 773] JAMES FERNANDEZ,

* * *

DIRECT EXAMINATION

BY MR. BUTCHER:

Mr. Fernandez, by whom are you employed, sir?

A. Pitney-Bowes.

Q. What is the general nature of their business?

A. We sell all types of mailing equipment.

Q. If I might approach the witness—I hand you what has been marked Government's Exhibit 40-A, 40-B and 40-C for identification purposes.

Have you had a chance to examine it, sir?

A. Yes, sir.

Q. And 40-A is what?

A 40-A is a postage meter rental agreement.

Q. And that was dated when, sir?

A. It was dated 9/17/69.

[Vol. 5, 774] Q. Were you present at the time that agreement was drawn up and executed?

A. Yes, sir.

Q. Where did this take place, please? Where did the execution of this agreement take place, sir?

A. I don't know the correct number, but it was in the building on Camino del Rio.

Q And what business establishment were you in in that building?

A. It was an office building.

Q. An office building. Whose office, what company name, sir?

A. There was quite a number of companies in the building.

Q. Did you sign that agreement at the time?

A. I certainly did.

Q. Did anyone else sign that agreement at the time?

A. Yes, Mr. Thomas.

Q. Do you know who Mr. Thomas is?

A. Yes, sir.

Q. What is his full name, if you know?

A. I don't know his full name. I just know him as Mr. Thomas.

Q. Do you see him in court today?

[Vol. 5, 775] A. Yes, sir.

* * *

Q. At the time Mr. Thomas signed that Pitney-Bowes meter rental agreement in your presence, did he give you any specific directions with what to do with the Pitney-Bowes meter head?

A. Yes, sir.

Q. And what were those directions?

A. To install the meter head at Library Services, Inc., 7525 Raytheon Street, San Diego.

Q. Is that an address other than the one you were in at the time?

A. Yes.

* * *

[Vol. 5, 776] Q. What is in the building? Have you ever been inside it?

A. Yes, I went inside. There was nothing, sir, in the building except a mailing machine.

* * *

[Vol. 5, 787] ALBERTA C. HOLMSTROM,

* * *

[Vol. 5, 788] DIRECT EXAMINATION

BY MR. BUTCHER:

Q. Where do you live?

A. 1942 Eldora Street, Lemon Grove.

Q. And where are you employed?

A. San Diego City, Treasurer's Office.

Q. Mrs. Holmstrom, are records kept at the Recorder's Office evidencing the everyday transactions of the Treasurer's Office?

A. I am in the Licensing Division where they sell business licenses.

Q. Right. Well, specifically related to the Business License Division?

A. Yes, sir.

* * *

[Vol. 5, 792] Q. And what is that, please?

A. It is an application for a business license.

Q. Do there appear to be any signatures on that application?

A. Yes, sir.

Q. Can you read what that signature appears to say?

* * *

Q. Can you read what that name appears to be?

A. It looks like D. Thomas.

Q. Pardon me?

A. It looks like D. Thomas.

Q. As to 41-E, can you tell us what that is?

A. It is a change of a location for a business application, business license application.

Q. Do you see any signatures on that?

A. I can see it, but it is very hard to read.

* * *

[Vol. 5, 799] WILLIAM E. DAVIS,

* * *

DIRECT EXAMINATION

BY MR. BUTCHER:

Q. Mr. Davis, where do you live, sir?

A. 2130 Palm Avenue, National City, California.

Q. You are employed by whom?

A. Bank of America, University-Highland Branch, 4444 University Avenue.

Q. Mr. Davis, I will hand you what has been previously marked for identification as Government's [Vol. 5, 800] 42, 43, and 44 for identification and ask you to examine them, please. What, generally, are those documents, sir?

A. Signature cards for checking accounts.

* * *

Now with respect specifically to Government's Exhibit 42, what is the name of the company involved? [Vol. 5, 801] Who signed for that card, sir, or the company name shown on that card?

A. Reed Enterprises, Inc.

Q. And could you tell us who the authorized signatures for that card are?

A. Shown on here?

Q. Yes, for that account.

A. William L. Hamling, authorized signature.

Q. Is that the only authorized signatures on 42?

A. No, we have a signature of the secretary, Shirley Wright.

Q. Set that aside, please, and take a look at No. 43, if you would.

As to 43, what is the name of the company involved, sir? Can you see the name of any business concern?

A. Greenleaf Classics, Inc.

Q. Authorized signatures are whose, sir?

A. William L. Hamling and Shirley R. Wright.

Q. As to Exhibit 44, would you tell us the name of the company there.

A. Library Service, Inc.

Q. Can you tell us who the authorized signatures for that exhibit are.

[Vol. 5, 802] A. William L. Hamling and D. L. Thomas.

* * *

VOL. 6.

[Vol. 6, 1037] MASAAKI HIRONAKA

* * *

[Vol. 6, 1037] DIRECT EXAMINATION

BY MR. BUTCHER:

Q. Mr. Hironaka, where do you live, sir?

A. I live at 2640 National Avenue, San Diego.

Q. And by whom are you employed?

A. I am employed by the United States Post Office at San Diego.

Q. Any specific substation or branch?

A. I am Superintendent of Pacific Beach Post Office.

Q. Mr. Hironaka, directing your attention to October of 1970, were you so employed at that location?

A. No. In September of 1970 I was Superintendent of the Grantville Station.

* * *

[Vol. 6, 1039] Q. Mr. Hironaka, in September of 1970, and with respect to the following three post office boxes, did you engage in any activity whatsoever relative to these three boxes?

[Vol. 6, 1040] A. Yes, I did. I received a —

Q. Mr. Hironaka, we won't inquire as to what you received. I will just ask you what you did relative to these boxes.

A. Relative to the boxes?

Q. Did you have any occasion to inquire of anyone about these post office boxes I just gave you?

A. Yes, I made inquiry.

Q. Where did you make such inquiry? At what location, sir?

A. This would be at 3511 Camino Del Rio South.

Q. What is located at that address?

A. That is the Mission Square Building which houses Reed Enterprises.

Q. Anyone else? Any other companies?

A. Library Services and Greenleaf Classics.

Q. When you made this visit out there did you have occasion to speak to any individuals at that address?

A. Yes, I was able to speak with a Shirley Wright.

* * *

[Vol. 6, 1041] Q. Mr. Hironaka on that occasion did you take any Post Office Department official forms with you at the time?

A. Yes, I did. I took three blank application forms. I think it is 1093.

Q. Any others?

A. And the old orders, the old applications which were for the three boxes.

* * *

[Vol. 6, 1042] Q. And that is what you have previously described as what, sir?

A. That is the box application for Post Office Box 20036.

Q. The name of the company involved there?

A. Reed Enterprises.

* * *

Q. Were you present when any signatures were affixed to that card?

A. Yes.

Q. And who was it that signed the card, sir?

A. Shirley R. Wright.

Q. In your presence?

A. Yes, sir.

Q. Now then, when did that occur?

A. That occurred on the 10th — the 7th of October, 1970.

[Vol. 6, 1043] Q. All right. Now drop down, if you would, to Exhibit 39-A. What is that document, sir?

A. That document is the standing delivery order.

Q. Relating to what post office box?

A. Relating to Box 20035.

Q. Now then, were you present when anyone — if anyone — affixed their signature to that card?

A. Yes, I was.

Q. Specifically inviting your attention to the second line of the card where it says, "Signature of Person Signing the Order"?

A. Yes.

Q. Who signed that, sir?

A. Shirley R. Wright.

Q. All right. Thank you. And that was on what day?

A. That was on October 7, 1970.

Q. All right. Incidentally, who typed out these two documents, if you know?

A. This was typed on the typewriter in the office of Shirley R. Wright.

Q. By her?

A. By her.

Q. Now let's go to Exhibit 39-B, which will be [Vol. 6, 1044] the lower one, the smaller card, Mr. Hironaka. 39-B is what?

A. The standing delivery order for Greenleaf Classics.

Q. Post Office Box No. —.

A. Post Office Box 20194.

Q. And was that document typed by anyone in your presence?

A. Yes, it was typed also by Shirley R. Wright.

Q. Now let's look at 38-B. Just describe the nature of that. What form is that, please?

A. This is a POD Form 1093, Box Application for P. O. Box 20194.

Q. Does that one relate to 39-B? Is that the idea?

A. Yes, it does.

Q. Same box number?

A. Yes.

Q. Now when was the application on that one?

A. This was an original box application of August 6, 1965.

Q. Thank you, sir. Now let's go to the one in the upper right which is Exhibit 38-C, if you will confirm that please.

A. Yes.

[Vol. 6, 1045] Q. On the back of the exhibit. Make sure it is marked that way.

A. 38-C.

Q. And the name of the company?

A. This is the box application for P.O. Box 20308 for Library Services, Inc.

Q. Now then, let me ask you this: Was this application also filled out as part of this transaction on 38-B, 39-B — I am sorry, 38-A, 39-A and 39-B that you described as having occurred on October 7, 1970?

A. Yes, it was.

Q. Now, did Mrs. Wright sign that card?

A. No, she did not sign this card.

Q. There is a signature there, though, correct?

A. There is a signature, yes.

Q. Were you present when that signature was affixed?

A. No, I was not present at the time.

Q. Would you explain to the jury the circumstances by which that signature was affixed, to the best of your knowledge.

A. To the best of my knowledge —

MR. KATZ: I am going to object to this.

[Vol. 6, 1046] BY MR. BUTCHER:

Q. Limiting it to what you actually saw.

MR. KATZ: Your Honor, if the witness said he didn't actually see it signed, I believe it would be irrelevant and calling for a conclusion of this witness.

THE COURT: Overruled. He can testify as to what he saw with respect to the document.

THE WITNESS: I had presented the blank application form to Mrs. Wright with request to up-date the information for the application of Library Services. As she did not readily know the exact person or persons she had taken the form out and made inquiries and then came back with a filled form with the signature on the card.

BY MR. BUTCHER:

Q. All right. Let's talk a minute about 39-C, the 3801 form. Did that leave your sight in an unsigned state and return in a signed state?

A. No, this card was signed in my presence.

Q. Oh, I see. Well, then, I am sorry. Let's go back to 39-C. Now then, once that card was brought back to you in a signed condition, what, then, did you do, if anything?

A. I requested that the signer submit identification which I had to see in order to put down the [Vol. 6, 1047] identification at the top of this form.

Q. I see. And what was the nature of that identification, just in general terms?

A. It was a California Driver's License.

Q. All right. Now then —

MR. KATZ: Your Honor, I would object to counsel approaching the witness with the exhibit. There has been no foundation laid that the exhibit is in any way known to the witness.

THE COURT: Lay a foundation.

MR. BUTCHER: I am going to approach the witness.

MR. KATZ: I object. It is in effect leading the witness.

THE COURT: Lay a foundation with respect to what you are about to show.

BY MR. BUTCHER:

Q. Mr. Hironaka, now did someone appear to present identification to you pursuant to your request?

A. Yes, Mr. Kemp came in and presented his driver's license.

Q. Do you know Mr. Kemp on sight?

A. Mr. Kemp is the gentleman sitting at the table with the beard.

MR. BUTCHER: All right. Let the record so indicate.

[Vol. 6, 1048] THE COURT: The record may indicate the witness has identified Mr. Kemp.

BY MR. BUTCHER:

Q. And, Mr. Hironaka, if you would take a look at 38-C, is that your form at the right on the top?

THE COURT: Excuse me. I notice there is another beard at the counsel table. Which man with the beard?

THE WITNESS: The man on the right; on my right.

THE COURT: Very well.

BY MR. BUTCHER:

Q. Taking a look at Exhibit 38-C, Mr. Hironaka, did you affix any identification numbers to that document?

A. I affixed the driver's license number R385093, California, expiring in 1971.

MR. BUTCHER: If I might approach the witness.

THE COURT: Yes.

BY MR. BUTCHER:

Q. Mr. Hironaka, I will hand you what has been marked for identification as Government's Exhibit 38-D and ask you to identify it, if you can, or let me ask you this: Have you ever seen that document or any document identical to it at any time in the past?

[Vol. 6, 1049] A. This appears to be a copy of the California driver's license.

MR. KATZ: Just a minute. I am going to object. It isn't responsive. The question was: Have you ever seen that document or any one like it?

THE COURT: Sustained.

MR. KATZ: Move the answer be stricken.

THE COURT: It will be stricken.

BY MR. BUTCHER:

Q. Have you ever seen that document or any document identical to it at any time in the past? Yes or no. Either that one or an identical document to it?

A. Yes.

Q. When might that have been?

A. That would be on October 7 at the time I saw Mr. Kemp.

Q. Now then, with respect to 39-C, that signature of Earl Kemp — let me say this. On the second line I will invite your attention to the name Earl Kemp.

A. Yes.

Q. Was that signature following that name signed in your presence?

A. Yes, it was.

[Vol. 6, 1050] Q. And by whom, sir?

A. By Mr. Earl Kemp.

* * *

[Vol. 6, 1058] Q. Is it correct to say, Mr. Hironaka, that the only reason you went out to 3511 Camino Del Rio South to have new applications signed was because you had received a letter from Mr. Schoof to Mr. Ebbing to have you have an officer sign for those boxes?

Q. Do you understand the question, sir?

A. Yes.

Q. And the answer is yes?

A. Yes.

* * *

[Vol. 6, 1065] Q. Did anybody tell you that Shirley R. Wright was the secretary of Greenleaf Classics?

* * *

Q. Did anyone tell you that, sir?

A. At the time that I wished to up-date this particular document, I requested Shirley Wright her connection with Greenleaf Classics, at which time she told me that she was Secretary-Treasurer, later changed to secretary.

Q. And did you ask her about any other individuals and their possible relationship with Greenleaf Classics, Inc.?

A. Yes, I attempted to get the other names and she did give me the name of President William Hamling and Vice-President Earl Kemp.

Q. Now, looking at Exhibit 38-C, about half way down the Exhibit, Signature of Applicant, and there is a signature and behind it in capital letters, "V.P." [Vol. 6, 1066] and the same appears at the bottom of 38-C behind the signature or the marking on the line, "Signature of Applicant." Did you put those in, as I understand?

A. Yes, I did.

Q. And did anyone tell you that Earl Kemp was Vice-President of Library Services?

MR. KATZ: Objection to that again, your Honor, as calling for hearsay.

THE COURT: Sustained.

BY MR. BUTCHER:

Q. Did Earl Kemp make any specific statement to you regarding any officership he may or may not have held in Library Services?

A. The only thing he stated was that he did not know all of the officers nor his capacity in the various organizations.

Q. All right. Did Shirley Wright make any statement to you with respect to any positions Earl Kemp may or may not have held?

MR. KATZ: Hearsay as to Mr. Kemp, your Honor.

THE COURT: Overruled.

THE WITNESS: The only one that I knew of is that it was determined that she — in conversation between Mr. Kemp and Shirley Wright, that he was Vice-[Vol. 6, 1067] President of Library Services.

Q. You overheard this conversation while you were standing there?

A. While I was standing there they conversed with each other to try to determine the positions of each in Library Services.

* * *

VOL. 10

[Vol. 6, 1506] MELVIN ANCHELL,

* * *

called as a witness by and on behalf of the Plaintiff, having been first duly sworn, took the stand and testified as follows:

THE CLERK: Take the stand, state your full name and spell your last name for the record, please.

[Vol. 10, 1587] DIRECT EXAMINATION

BY MR. BUTCHER:

* * *

[Vol. 10, 1710] Q. Dr. Anchell, I have handed you what has been marked Government's Exhibit 2-A, you may disregard the envelope and contents. Exhibit 2-A — have you seen a copy identical to that, prior to coming to court today?

A. Yes.

Q. Have you had occasion to consider it as a whole?

A. Yes, I have.

Q. Including both sides of the document?

A. Yes, I have seen both sides.

Q. Now, do you have an opinion with respect to whether or not that document has any given dominant theme?

A. Dominant theme?

MR. FLEISHMAN: Excuse me. Just answer yes or no.

BY MR BUTCHER:

Q. Do you have an opinion?

A. Yes.

[Vol. 10, 1711] Q. And could you tell the Court and jury what your opinion as to the dominant theme of Government's Exhibit 2-A would be?

* * *

Q. What is your opinion with respect to the dominant theme of Government's Exhibit 2-A?

A. Pruriency.

* * *

VOL. 11

[Vol. 11, 1729] MR. FLEISHMAN: If the Court please, your Honor will recall at the tail end of the last session I was objecting to the questions. We talked in terms of the appeal of specific pictures to various deviant groups and it was our position that the material, of course, had to be taken as a whole and had to be measured solely by its impact upon the average person.

At this time, your Honor, we respectfully move to strike from the record all of the testimony given by Mr. Anchell with regard to the appeal of the material or portions thereof to deviant groups.

The basis for this motion, your Honor, is twofold. One is constitutionality. The second is the Bill of Particulars which has been submitted by the Government in this case.

* * *

VOL. 13

[Vol. 13, 2222] FRANK GETLEIN,

* * *

DIRECT EXAMINATION

BY MR. BUTCHER:

[Vol. 13, 2369] Q. Thank you, Mr. Getlein. I hand you what has been marked Government's Exhibit 2-A. Have you seen that or an identical advertisement prior to coming to court today?

A. Yes, sir, I have.

Q. And was it the same time we had our conversation relative to Government's 65, was it?

A. Yes, sir.

Q. Have you examined Government's Exhibit 2-A in its entirety?

A. Yes, I have.

Q. All sides? Front? Back? Everything?

A. Yes.

[Vol. 13, 2371] Q. Do you have an opinion whether or not Government's Exhibit 2-a is or is not possessing of any redeeming social value?

A. I do.

Q. And could you give us that opinion?

* * *

Q. What is that opinion, sir?

A. It is that in fact there is no — absolutely no redeeming social significance in this flyer or throw-away mailing piece at all.

Q. Could you give the Court and jury your reasoning underlying that opinion first and then we will go back to the community standards thing.

A. Yes, sir.

* * *

[Vol. 13, 2372] Q. Perhaps Mr. Getlein, it would be easier if we went back and did the community standards issue. Let me ask you first, do you recognize any of the pictures in the advertisement. Have you ever seen those before?

A. Yes, sir.

Q. Where?

A. In Government's Exhibit 65.

[Vol. 13, 2373] Q. In fact — let me ask you this. Do you see any pictures in Government's Exhibit 2-a that did not come from Government's Exhibit 65?

A. No, sir.

Q. Fine. Then let me ask you this. Would your reasoning underlying your conclusions insofar as Government's Exhibit 65 is concerned as to the issue of community standards — would that same reasoning be applicable to Government's Exhibit 2-a?

A. Yes, sir.

Q. Now would you care to elaborate on that if you have any further reasons over and above that which you gave for Government's Exhibit 65?

A. No, they are basically the same reasons.

Q. Now, Mr. Getlein, regarding the question — asking you for further elaboration of your previous statement regarding the absence of redeeming social value, could you give us a few of the reasons for that conclusion, sir?

A. Well, in the first place, the vast majority of — the sheer space on this flyer or throw-away mailing piece comes under the same — comes under everything that has been said about the book because this entire side — one entire side consists of color photos from the book, including the incident of [Vol. 13, 2374] ejaculated sperm on the faces of two girls in a group, including a kind of group lesbian masturbation, including bestiality, sexual relations between a girl and a beast or possibly two beasts — on the one hand. That is one whole side. That is fifty per cent of the piece.

Approximately two-thirds of the other side is simply the title with — subject to what I was saying about simply the jacket, the cover — with the title, with the faint implication that to turn the page and look at these colored pictures of wild sexual activity going on is

somehow patriotic because of the red, white and blue motif on the picked out two-word Illustrated Pornography and the American eagle wing spread overhead.

Of the remaining one-third of one-half of this, one-third of that is a coupon for recipients, presumably to send in their $12.50. One-third is technical instructions to return the coupon and send the $12.50 and one-third — any kind of social value would have to inhere in this, this one-third of one-half of the entire piece.

What this one-third is, is simply a selling piece with kind of a pass at liberty of expression and learning, et cetera, being made very faintly even [Vol. 13, 2375] in that. So that obviously the overwhelming weight of this sales appeal is contained on the illustrated side.

Another point in the relation between this mailing piece and the book, is that all of the illustrations, this whole side, are in fact taken from the color shots so that there is an implication, although it isn't actually stated — in fact it said completely illustrated in black and white and full color but nevertheless there is an implication, since everything you see here is in color, that everything in the book is in color and this in fact is not so. The color is a very small — not a very small part but a minority of the illustrations. Moreover, the illustrations in the throw away are certainly among the more extreme sexual illustrations to be found in the text, including this as I have cited. So therefore, those roughly are the reasons for my opinion.

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VOL. 14

[Vol. 14, 2422] CROSS-EXAMINATION

BY MR. FLEISHMAN:

* * *

VOL. 15

[Vol. 15 2696] BY MR. FLEISHMAN:

Q. Now it is a fact, is it not, Mr. Getlein, that a photograph of a female touching the genitalia of a man is not beyond customary limits of candor merely [Vol. 15, 2697] because that scene is depicted. That is the fact, is it not?

* * *

THE WITNESS: Yes, that is the fact.

BY MR. FLEISHMAN:

Q. So such a picture would be within customary limits of candor, or could be, just that portrayal, right?

* * *

THE WITNESS: As subject matter alone, not necessarily, it seems to me.

BY MR. FLEISHMAN:

Q. Well, when you say not necessarily, that carries with it but also it may, is that right?

A. Yes, depending upon, as with most things in life, depending upon the context in which it appears, what it is intended to mean and what it adds up to as part of a lot of other things adding up to something.

[Vol. 15, 2698] Q. But that picture itself could be, depending upon the context in which it is portrayed—could be within customary limits of candor as you know them, is that right?

A. Also, I just—

Q. Just a minute. First answer, then you can explain all you want, Mr. Getlein.

A. The question is—it could be.

Q. Depending upon the context in which it is found?

A. Correct.

Q. Do you want to explain?

A. Yes, I seem to recall that at that point in my earlier testimony with Mr. Butcher that he was asking me to distinguish, and I did distinguish between acts —sexual acts obviously accepted by the community as within its standards and on the other hand the depiction of those acts, and my testimony was that this act obviously was within community standards.

Q. You have just told us that a picture of that in a proper context is also within community standards, isn't that the fact?

A. I told you that it could be, yes.

Q. All right. And it is also a fact, is it not, that a photograph of fellatio—that is to say a [Vol. 15, 2699] having mouth-genital contact with the penis of a man—could be within community standards also in the correct context; right?

A. In, for example, a really scientific study of sexual activity, it presumably could, yes.

Q. Even if that were available to the general public as long as it was bona fide scientific study; right?

A. I think myself at the present time that depiction —yes, in a bona fide setting, right, but that depiction I am inclined to think is just a trifle over the line for

the general broad community standards at this time. It would not appear in Life magazine.

Q. Many things that wouldn't appear in Life magazine are still within community standards, isn't that the fact?

A. Well, yes, that is true.

Q. It is also the fact, is it not, Mr. Getlein, that a photograph of cunnilingus in a proper setting is within community standards?

A. In the setting we have been talking about, yes.

* * *

VOL. 17

* * *

[Vol. 17, 2975] MR. BUTCHER: The Government will rest, your Honor.

* * *

[Vol. 17, 3017] MR. KATZ: Under Rule 29, your Honor, of the Federal Rules, the defendants are entitled to move for entry of a judgment of acquittal at the close of the prosecution's case.

At this time, on behalf of my three clients—Shirley Wright, Earl Kemp and David Thomas—I would like to so move on the basis that the evidence heretofore submitted is insufficient to sustain a conviction of any of the offenses charged.

* * *

[Vol. 17, 3106] MR. FLEISHMAN: All right.

If the Court please, initially, just so the record is clear, we move under Rule 29 for a judgment of acquittal on the ground that there is no evidence on any of the essential elements of the offense with regard to both

cases, both with regard to Texas and with regard to the San Diego case.

* * *

VOL. 18

[Vol. 18, 3146] THE COURT: This being the time for the Court's decision on the motion under Rule 29 for judgment of acquittal, this Court determines that the proper test on a Rule 29 motion would be that set forth in [Vol. 18, 3147] *Curley vs. United States at 160 Fed. 2d 229*, wherein the court states through Judge Prettyman, and I quote:

> "If the evidence is such that a reasonable juryman must necessarily have such a doubt, the judge must require acquittal because no other result is permissible within the fixed bounds of jury consideration, but if a reasonable mind might fairly have a reasonable doubt or might fairly not have one, the case is for the jury and the decision is for the jurors to make.
>
> "The true rule, therefore, is that a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether, upon the evidence, giving full pay to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion.
>
> [Vol. 18, 3148] "Or to state it another way, if there is no evidence upon which a reasonable mind

might fairly conclude guilt beyond a reasonable doubt, the motion must be granted.

"If he concludes that either of the two results — a reasonable doubt or no reasonable doubt — is fairly possible, he must let the jury decide the matter."

After a complete review of all of the evidence herein, both oral and documentary, together with the inferences that may be fairly drawn therefrom, and applying the aforementioned test thereto, this Court is of the opinion that the defendants' motions should be denied.

Turning now to defense counsel's argument that by definition a conspiracy requires an agreement to do an unlawful act, this is no doubt true.

The question arises, then, whether the degree of specific intent or scienter required to prove the conspiracy is greater than the specific intent or scienter required as to the substantive count.

This question is not without some logic. In fact, the California rule would seem to support that [Vol. 18, 3149] theory by requiring some degree of criminality in conspiracy cases. *Witkin in California Crimes, Volume 1 at Page 108.*

The Appellate decisions in the Federal Courts do not specifically answer this question in regard to conspiracy to violate obscenity laws, but the Supreme Court Case of the *United States vs. Ingram* in *360 U.S. 672 at 677 and 678*, dealt with the Federal Conspiracy Statute, 18 U.S. Code 371 and rejected the requirement of criminality.

"It is fundamental," the court said, "that a conviction for conspiracy under 18 U.S. Code 371 cannot be sustained unless there is proof of an agreement to commit an offense against the United States,"

citing *Pereira vs. U.S.*:

"There need not, of course," as the court goes on, "be proof that the conspirators were aware of the criminality of their objective, but an essential ingredient of proof was knowledge on the part of Smith and Law that Ingram and Jenkins were liable for Federal taxes by reason of the gambling operation. [Vol. 18, 3150] Without the knowledge, the intent cannot exist."

The court then cites *Direct Sales Company vs. U.S.*:

"Conspiracy to commit a particular substantive offense," the court goes on, "cannot exist without at least the degree of criminal intent necessary for the substantive offense itself."

The substantive offense which Smith and Law were accused of conspiring to commit was the willful evasion of Federal income tax, an offense which, even presuming knowledge of the tax law, obviously cannot be committed in the absence of knowledge or willfulness. Therefore, on the basis of the *Ingram* case, this Court rejects the defendants' arguments.

* * *

[Vol. 18, 3151] Finally, with respect to the matter of comparables, which we have talked about in recent times — it is the Court's opinion that the cases support the proposition that the Court is required to allow

defense counsel to proceed in order to show the community standards involved, either by comparables, by the introduction of comparables or by the introduction of expert witnesses with respect to the elements to be shown. The Court finds and rules that comparables will not be permitted for this reason: primarily, they tend to confuse the jury. They tend [Vol. 19, 3152] to set up matters that I feel would serve no probative value in comparison to the amount of confusion and deluge of material that could result therefrom.

The Court will permit, however, the defendants to proceed with the defense of their case based upon the testimony of expert witnesses, and the Court has been informed and would inquire of the defendants and through their counsel whether or not their number of experts now exceeds their original thought of eight. Do you expect to produce more than eight?

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[Vol. 18, 3186] W. CODY WILSON

* * *

DIRECT EXAMINATION BY MR. FLEISHMAN

* * *

VOL. 19

[Vol. 19, 3401] MR FLEISHMAN: The first matter has to do with the problem that I have in the case, your Honor, that I discussed with your Honor once before with regard to what the issues are, and I have particular reference, really, to what seems at this stage to still be a somewhat unsettled question, your Honor, whether or not the test is whether the dominant theme

of the book taken as a whole appeals to the prurient interest of the average person.

THE COURT: That is one of the tests.

MR. FLEISHMAN: It is our view, your Honor, that under the Bill of Particulars in this case, as I have explained to your Honor before, that that is all that is involved in this case, plus the fact — if your Honor even takes the proposed instruction of the Government with regard to some clearly defined sexually deviant group — now the Government has rested, your Honor, and I am talking now to proposed instruction No. 5, which is found on Page 10 of the Government's Proposed Instructions:

> "If you do not find that the dominant theme of the material appeals to the prurient interest in sex of the average person, you [Vol. 19, 3402] must then consider whether or not the materials involved are designed for a clearly defined deviant sexual group and whether the material taken as a whole appeals to the prurient interest in sex of the members of that group."

Now I know I have stated this before, your Honor, but there has to be some evidence that the material was designed for a clearly defined deviant sexual group, which has not been introduced here.

Besides the other criteria, it has to be distributed primarily to that sexually deviant group, a clearly defined sexually deviant group, before this *Mishkin* test would be applicable.

So there is a failure of proof on both sides of the factual condition, coming to any clearly defined sexual

group, plus the fact that there isn't even a clearly defined deviant sexual group that the Government has identified.

Now, plus the fact, which seems to me to be of substantial importance, that the Government has limited itself by its Bill of Particulars so that we have a situation, your Honor, whereby we were not prepared to defend against a charge other than a charge that the material appeals to the prurient interest of [Vol. 19, 3403] the average person, and we had made that perfectly clear in our papers, and the Government had made it perfectly clear in their papers that they were accepting that as being the issue.

For us now to be in the position of trying the case with some evidence then by the Government which we think is improperly in, and requiring defendants at this stage — I don't know how your Honor is going to instruct.

My own feeling is that we shouldn't have to get into it. I don't want to get into it. I think it is outside the case. I think that the test in this case under these circumstances is the prurient appeal, if any, to the average person.

It places an unfair and impossible burden upon us, your Honor. I think it denies us due process of law and the protections afforded by all of the cases which really sought to afford first an amendment protection to material that was being charged by having as much specificity as the law is able to give us in this area, which isn't very much, but this is absolutely, your Honor, as I indicated before, a return to *Hicklin*.

But the more important aspect of it is, there is no factual basis for it because the two preconditions before the *Mishkin* case would come in [Vol. 19, 3404] would be, as I say, that it was designed for a particular clearly defined sexually deviant group and was primarily distributed to that group, and as I say, neither of those apply.

In short, Your Honor, I would hope for some ruling by the Court. I suppose, or indication, with regard to the instruction that will be—I hope—the appeal to prurient interest of the average person, because I don't want to pursue it with my witness into areas that I think are absolutely outside of the scope of the issues which were denied to the Defendants I represent and to the other Defendants, due process of law and the rights secured by the First Amendment.

On the other hand, I feel uneasy at not doing it on the thought that perhaps after all it is all over Your Honor is going to instruct and I have defended perfectly on the issue as I saw it and that I am outflanked, which is a problem.

* * *

VOL. 20

[Vol. 20, 3421] THE COURT: Let the record show that the defendants are present with their counsel, that the jury is not present.

There were two matters that were to be taken up that were brought to the Court's attention at the last hearing. One was the matter of the *Mishkin* case, I believe. Mr. Fleishman wanted to know what he was going to have to defend against.

I have reread the *Mishkin* case and have reread the cases that it cites, and I find that I do not put the narrow construction on the *Mishkin* case [Vol. 20, 3422] that you do, Mr. Fleishman. I think that it is a little broader than you related to the Court. Therefore, I suggest that a properly drawn instruction will be given to the jury with respect to the matter and that you will be required to defend in that manner.

MR. FLEISMAN: Let me just state for the record, your Honor, that that is, in my opinion, outside of the scope of the issue; that it is beyond the Bill of Particulars furnished by the Government, the Bill furnished in response to ours where, as I pointed out to your Honor on at least two occasions and perhaps three — I don't have it before me — the Government stated that the issue was whether the material appealed to the prurient interest of the average person, period.

There was no suggestion of any kind or form that there was any group other than the average person involved. I did not prepare to defend against a *Mishkin* charge. I am not prepared now to defend against a *Mishkin* charge, and in my opinion the defendants are being denied due process of law and the right secured by the First Amendment in having thrust upon them in the course of the trial an entirely different charge than the one found in the Indictment and found in the Bill of Particulars.

I would like the record to show that I [Vol. 20, 3423] believe it is a denial of due process of law for us to be required at this late stage to defend against a charge not made, your Honor.

THE COURT: All right. I believe the prurient appeal is sufficient as set forth to cover both the average person, and if that not be the case, to those people included within the ambit of the *Mishkin* case.

* * *

[Vol. 20, 3515] MR. FLEISHMAN: May I state the stipulation so I understand it?

It is stipulated by and between the parties that each and all of the sexual depictions set forth in Table 11 are fairly and accurately portrayed in Exhibit 65, and that the same type of pictorial material was used [Vol. 20, 3516] in connection with the Commission work. Is that a correct statement?

MR. BUTCHER: Generally speaking.

MR. FLEISHMAN: Generally speaking, yes, I accept that stipulation.

THE COURT: Very well.

MR. FLEISHMAN: May we have the same stipulation with regard to Table 12?

MR. BUTCHER: We would stipulate that there are pictures in the book that depict the activities shown in Table 12 and that somebody, sometime, in the work of the President's Commission on Obscenity and Pornography, at least somebody, used at least one picture like that sometime.

We would agree to that. We have agreed all along that the entire subject matter here is, in Dr. Wilson's words, sexually explicit material, and to that extent everything here is sexually explicit material, so to the extent that the Commission dealt with that, there is no

question but what they dealt with all the types of pictures used.

MR. FLEISHMAN: I accept that stipulation.

THE COURT: I didn't think that matter was in contest, Mr. Fleishman. I don't think there is any point in pursuing it at all.

[Vol. 20, 3517] MR. FLEISHMAN: I accept the stipulation, your Honor, if that may close that area.

THE COURT: The stipulation is even broader than that, the whole theory of the stipulation. The Government doesn't contest that, that or any portion of it.

MR. FLEISHMAN: Well, in any event, one way or the other, we have to make it by evidence. I am prepared to accept this stipulation, your Honor, as I said.

* * *

[Vol. 20, 3518] BY MR. FLEISHMAN:

Q. Were there any studies at all or any work done by the Commission in connection with the pictures having to do with sexual activities between humans and animals?

MR. BUTCHER: We have stipulated to that, your Honor, that some Commission studies had used bestiality.

We have already entered into the stipulation.

MR. FLEISHMAN: That was not included in the stipulation so far, your Honor. I am prepared—I [Vol. 20, 3519] would offer a stipulation, your Honor, and if counsel would accept it we could make do with that.

That is, that in connection with the work of the Commission on Obscenity and Pornography, which is the text here, that there were pictures used of sexual

activity between humans and animals and that the use of these pictures took a variety of forms within the framework of research projects, within the framework of what the Commissioners themselves were observing and considering with regard to their overall work and what the Commissioners were viewing as part of their overall work.

If that is the stipulation that Mr. Butcher is willing to enter into, I would accept that.

MR. BUTCHER: No, we have already stipulated that every picture in this book was used by at least one of the researchers somewhere in the work of the Commission. We have never argued about that.

We are talking about the misstatement of the use of pictures by people who never even used pictures like that.

THE COURT: All right. If you will not accept the stipulation, then, Mr. Fleishman, you may ask your question and Mr. Butcher can object to it.

MR. FLEISHMAN: We hadn't stipulated that far, but [Vol. 20, 3520] I think I would be prepared to accept Mr. Butcher's stipulation. That is, that every picture in the Illustrated Report, found in the Illustrated Report, is similar to at least some of the material that was used by some of the researchers in some of the Commission work—of the Commission on Obscenity and Pornography.

If that is the stipulation, I accept it.

Is that the stipulation, Mr. Butcher?

MR. BUTCHER: We would stipulate to that if it would limit the parading in of witnesses in here to

say, "Yes, I used this kind and I used this kind and I used this kind."

MR. FLEISHMAN: It will have that effect and I do accept the stipulation, your Honor.

THE COURT: Very well.

* * *

[Vol. 20, 3544] Q. Dr. Wilson, we were talking about your reasons for believing that the book, Exhibit 65, did not patently offend national standards with regard to sex, nudity and excretion.

Would you please state your reasons for your belief —for your opinion, I should say.

A. Yes, it is based in part on scientific surveys and studies that indicate that people accept these kinds of materials in our society; secondly, that they have had experience with these kinds of materials in our society; thirdly, that people in responding to the kinds of illustrations or pictorial materials that are used as illustrations of this do not agree that they are universally highly offensive.

Another part of my opinion for the basis of my opinion is that these materials are available and are accepted by people in many places, most places in the United States.

MR. BUTCHER: We would move to strike, in the absence of a foundation, as to his basis for acceptability. The availability therefor, in and of itself, is immaterial.

THE COURT: The availability is immaterial. To that extent the objection is sustained.

[Vol. 20, 3545] BY MR. FLEISHMAN:

Q. Is there a reasonable degree of community acceptance of such material, Dr. Wilson?

A. Yes, I think so.

Q. And what is the basis for your opinion that there is a reasonable degree of community acceptance of such material?

A. Partly based on surveys of people; partly based on my own conversations with people; partly based on the reports of people that they have purchased materials of this sort.

Q. Dr. Wilson, do you have an opinion as to whether or not Exhibit 65, the Illustrated Presidential Report of the Commission on Obscenity and Pornography, does or does not go substantially beyond customary limits of candor in the description or representation of matters pertaining to sex, nudity or excretion in the nation as a whole?

A. Yes, I have an opinion.

Q. What is your opinion?

A. My opinion is that it does not.

Q. And would you tell the jury the reasons for that opinion, please.

A. Yes, the reason for my opinion is the basis of surveys done with national samples, representative [Vol. 20, 3546] samples of people in the United States and other smaller more circumscribed surveys that indicate that people accept this level of depiction of explicit sexual materials; further, that they do buy and use substantial numbers of them, materials of this sort that are used as illustrations in this book.

Q. Dr. Wilson, I hand you the brochure which has been marked Government's 2-A in evidence. Have you seen that brochure before?

A. Yes, sir, I have.

Q. Do you have an opinion as to whether or not that brochure considered as a whole does or does not appeal to the prurient interest of the average person?

A. Yes, I have.

Q. What is your opinion?

A. My opinion is that it does not appeal to the prurient interest.

Q. What is the basis of that opinion?

A. A series of scientific studies which have utilized pictures that are similar to those in this brochure and ask people to respond to them, to talk about them. Also, the fact that there have been a number of surveys of people's experience with materials of the sort that are illustrated here.

[Vol. 20, 3547] All of this evidence indicates that people's primary interest in these kinds of materials is a natural curiosity about sex, a natural interest in sex, a seeking of information about sex.

Q. Do you have an opinion as to whether or not Exhibit 2-A in evidence, the brochure, does or does not appeal to the prurient interest of any clearly defined sexually deviant group?

A. I have an opinion.

Q. What is your opinion in that regard?

A. My opinion is that it does not.

Q. And would you state to the jury your reasons for that opinion?

A. It is similar in nature on the basis of scientific experiments and surveys inquiring into people's reactions to these kinds of material, their reasons for looking at these materials, their reactions to them.

All of this indicates that the interest which people have in these materials and most people have had some experience with these materials, is essentially derived from a curiosity about them, from a natural, normal interest in sex and seeking of information about sex.

Q. Do you have an opinion as to whether or [Vol. 20, 3548] not the brochure, Exhibit 2-A in evidence, does or does not patently offend national standards, with regard to sex, nudity or excretion?

A. I have an opinion.

Q. And your opinion is what?

A. My opinion is that it does not patently offend.

Q. And your reasons, if they would be the same as before, tell us so; if they would be different, tell us.

A. They are essentially the same as before.

Q. Do you have an opinion as to whether or not the brochure does or does not go substantially beyond customary limits of candor in the nation as a whole in the depiction or representation of matters pertaining to sex, nudity or excretion.

A. I have an opinion.

Q. And your opinion is what?

A. That it does not.

Q. And will you state again the reasons or you can incorporate previous reasons if you would like to.

A. The reasons are the same ones which I have announced before.

Q. In your opinion does the brochure have any redeeming social importance?

[Vol. 20, 3549] A. Yes, I think that it does.

Q. And will you state your reasons to the jury, please.

A. It is an advertisement for a book that contains a great deal of information, of facts, relative to a very important issue in our society, and that it has importance in trying to communicate the existence of this book to people and ask them to buy it and to read it.

* * *

VOL. 21

CROSS-EXAMINATION

[Vol. 21, 3582]

BY MR. BUTCHER:

* * *

[Vol. 21, 3674] Q. Can prurient interest exist in a given work, or more precisely, can an appeal to the prurient interest exist on the face of a given pictorial depiction absent any acting out or causal relationship or excitation on [Vol. 21, 3675] the part of the viewer?

A. That is a rather complicated question with several different aspects of it. If we could take some of them—

Q. Take them any way you want, Doctor.

A. I think my belief—my expert opinion is, on the basis of a number of studies, that photograph, on the face of the photograph itself, cannot appeal to a prurient interest of an average person; that we have to know more about the interest that a person brings to viewing a photograph and the kind of subjective judgments that he makes and subjective responses that he makes to this.

I would say that to some extent that if prurient interest is defined in terms of lust, in terms of an excessive sexual interest that demands unrestrained grat-

ification, that then, you know, the kinds of responses that a person makes to a picture certainly has something to do with the kind of interest that it arouses, that it appeals to, that is involved in it.

Therefore, in response to your question, I think a picture on the face of it we cannot say anything about what interest it appeals to until we look at average people and find out what interest they bring to it, what kinds of subjective judgments they make, [Vol. 21, 3676] what kinds of responses, subjective and external that they make, yes.

Q. In other words, if nobody is looking, the picture can't have prurient appeal. Is that the sum and substance of what you are saying?

A. I said we can't make a judgment about the prurient interest that a picture appeals to unless we know what is brought to it; that is right.

* * *

[Vol. 21, 3683] Q. I will hand you what has been marked Government's 2-A, an advertising brochure.

A. Yes, sir.

Q. In discussing that item yesterday or last Friday, you offered an opinion, did you not, that there was no appeal to prurient interest in that advertisment brochure?

A. I think I did offer that opinion, yes, and I gave an abbreviated explanation of my reasons. Shall I elaborate on that again?

Q. Well, just generally, were they: 1) that there was a certain natural curiosity?

[Vol. 21, 3684] 2) a natural interest on the part of the viewer?

3) one might be seeking information about sex?

Is that a fair summation of what your testimony was?

A. Those kinds of things would enter into my opinion, yes.

Q. All three of these reasons you offer, Doctor, for an absence of prurient interest or an appeal thereto in the brochure — all center about the viewer's reactions, do they not, and the reasons he would want to look at this type of material?

A. It seems to me that the interest that is supposedly being appealed to resides in the viewer, and therefore I have to refer to the viewer and his response to the picture and not to the picture itself, yes.

Q. In other words, there has to be some sort of sympathetic reaction before there can be said to be any appeal?

A. I think there has to be this kind of an interest in existence among people before it can be appealed to, yes, and my testimony is that the kind of interest which people bring to — interest in dealing with explicit sexual materials — is not the prurient interest, as we [Vol. 21, 3685] talked about, that involves lust, unrestrained sexual desire, shame, morbidity. But it is a curious curiosity, a seeking of information, a rather natural kind of interest that is brought to it, yes, sir.

Q. You are married, are you not?

A. Yes, I am.

Q. If you and your wife were walking down the street and saw a very attractive young lady that turns your head as she went walking by, she can be said to have a certain degree of sexual appeal, at least for you; correct, being a male, red-blooded American male?

A. Wait a minute. Are we saying what she would say or what I would feel?

Q. Just a young lady, well-dressed, very attractive.

MR. FLEISHMAN: If the Court please, I will object to the question. He can ask hypothetical questions but I think this is not a proper question.

MR. BUTCHER: This is a simple analogy.

THE COURT: Overruled. This is preliminary.

THE WITNESS: Right, no, okay.

BY MR. BUTCHER:

Q. If you and your wife were walking down the street and approaching toward you —

[Vol. 21, 3686] MR. FLEISHMAN. May it just be Mr. Butcher and his wife instead?

MR. BUTCHER: All right, I will put myself into the area.

BY MR. BUTCHER:

Q. If myself and my wife were walking down the street and an attractive young lady came from the front and passed us and I turned my head to look at her, one might say she appealed to me, I found her appealing physically, perhaps, that the young lady may have had what we would generally call sexual appeal. Would that be a fair characterization of whatever appeal this young lady may have?

A. Well, I don't know about you. I can't testify about you.

Q. Assuming I did turn my head that way; my wife, however, would not have turned her head because she might not have found her at all appealing from a physical view standpoint. Now had my wife

been walking down the street alone and she didn't look at the young lady, could we fairly say that because she didn't appeal to my wife that she has no appeal at all? Would these characteristics vanish?

A. It seems to me just as you have been describing here that what we have to do in talking about the [Vol. 21, 3687] appeal of this stimulus of the attractive woman is to look at the response of the people.

Q. Right.

A. That they bring to it.

Q. Perhaps so.

A. Their attitudes, their judgments, their feelings, the kind of interest that they bring.

Q. Whether they are a man or woman.

A. It is possible, you know, that some person might turn and look because of an interest in clothes.

Q. Right.

A. Or because of beauty, or because of a sexual interest. There are any variety of kinds of interest that might be brought to bear on looking at anything in the world, and that, you know, you can't talk about the appeal until you talk about the interest that is brought there.

Q. In other words, you are saying there is none unless there is some manifestation of interest.

A. I do not see how we can talk about appeal to the prurient interest unless we can demonstrate that the people are bringing this kind of interest to bear on this picture. It is just inconceivable to me. You know, I cannot describe the kind of interest that any picture, any person, or any object in the environ-

ment [Vol. 21, 3688] appeals to unless I have some information about what kind of interest people bring to this object and what kinds of interest people have in the environment where this object occurs.

Q. In other words, then, Doctor, is it a fair summation of your testimony that you add here to the adage, beauty is in the eye of the beholder; or to plug it into the context in which we are dealing, obscenity is in the eye of the beholder; nothing more or less?

A. It seems to me that a judgment of obscenity occurs in the person who is looking at an object and making the judgment, yes.

Q. All right. Now you also spoke about the question of patent offensiveness and whether or not the advertising brochure here, Government's 2-A, and whether or not that went substantially beyond the contemporary community standards in dealing with matters sexual generally, and as I recall your testimony, it was that it was not patently offensive and it didn't go substantially beyond the community standards. Is that not correct?

A. That was my testimony, yes.

Q. Would you take a look at Government's Exhibit 2, please.

A. Yes.

[Vol. 21, 3689] Q. The envelope.

A. The envelope, yes, sir.

Q. Examine the name of the addressee, please.

A. Yes, sir.

Q. What is that name?

A. I am not sure I can pronounce it, but it is W and then a last name, R-e-i-n-i-g-e-r.

Q. Dr. Wilson, assuming W. Reiniger was Mrs. Willoughby Reiniger, age 75, Orange City, Iowa, and assuming Mrs. Reiniger had not solicited that advertising brochure or any other advertising brochure from Library Services, Inc., or any other sexually oriented material of any kind from anybody in her entire life. Would your testimony be the same relative to the non-offensiveness of that particular brochure?

A. Non-offensiveness to the general community? I think it would remain the same, yes.

As I have testified before, there are people in our society who are offended by various kinds of things, not just sexual materials and not just materials as explicit as this, and there are minorities of people who are offended, but to my mind as we have been discussing, this is not what we were talking about in terms of the standard but rather the community standard which involves groups of people and not one individual [Vol. 21, 3690] being offended.

Q. But it also includes Mrs. Willoughby—

A. I hope, Mrs. Willoughby, if she really exists, this was an assumption.

Q. She does.

A. This was a hypothetical you raised to me—is a part of the community, yes.

Q. Finally, you testified, I recall, that the advertising brochure had, in your view, redeeming social value for two reasons: 1) an advertisement offering for sale what you described as an important book and 2) it was trying to communicate to people the existence of this book, presumably for their purchase thereof.

Q. Is that your testimony?

A. I think my testimony was essentially that, yes.

Q. You have previously testified, of course, as to all three of the elements of obscenity regarding the book in question, Government's 65, and your testimony is that it doesn't meet any of the elements of obscenity; therefore, the book is not obscene in your opinion. Is that not correct?

A. I have testified essentially to this, that it does meet all three of these standards which is [Vol. 21, 3691] required by law, and then we discuss each of the standards generally, and I have given my opinion on those, yes.

Q. Assuming for the moment that the book were an obscene book, would that fact tend to alter your opinion regarding the redeeming social value of the advertisement itself if in fact we assume the book is obscene for a moment?

A. I am sorry, I lost a part of the question.

Q. All right. Let's assume that the book is obscene.

A. Yes.

Q. One element of which is an absence of redeeming social value; correct? If in fact we make this assumption?

A. If a book is judged—if a book is judged legally obscene.

Q. Right.

A. Then, you know, this would have to imply that it did not have redeeming social value, because in order to be classified as obscene a book must meet all three criteria.

Q. Right.

A. It must appeal to the prurient interest and it must be offensive and it must have no redeeming social value; all three; so if it is classified as [Vol. 21, 3692] obscene in a legal process —

Q. By definition.

A. (Continuing)—then by definition there has been a legal judgment that it does not have.

Q. But we haven't got that yet here; what we are doing is assuming that this book is obscene and more specifically we are making the assumption it has no social value, one of the three, anyway. Would the advertisement have social value notwithstanding the fact that the book is assumed, for now, to be obscene?

A. This is an awfully abstract question, because it is a concrete, you know — a concrete illustration to a concrete book that I know all about, and my opinion is that it is not obscene.

Q. Right. Well, let's assume for a moment your opinion is in error.

A. I would have to feel that if this is an advertisement for this book and my knowledge of what is in this book —

Q. We are now assuming the things I have asked you to assume.

Assuming you are wrong about your opinion insofar as the book is concerned, assuming the book is obscene, would then the advertisement have any redeeming social value?

[Vol. 21, 3693] A. It seems to me that to the extent which the advertisment presents some ideas of what the book that is trying to sell has in it, then the statements

that this brochure makes about the content of the book that it is trying to sell, that this has redeeming social value.

Q. What direct quotations are there in 2-A from Government's 65?

A. Direct quotations from what?

Q. What direct quotations are in Government's Exhibit 2-A that you also find in Government's Exhibit 65?

A. I didn't say that there were any direct —

Q. Would you take a look at the reference to the Katzman study on the other side of the advertising brochure. That is one, is it not?

A. Yes, but I said I didn't say there was. There is this. I am not sure it is a complete, direct quote. It looks to me like a part of it is cropped off over here.

Q. But to your knowledge is that the only place in the entire brochure that we see any kind of direct quotation from the book other than, I guess, the reproduction on the front?

A. The reproduction on the front — I would have to read the whole thing again and see.

> [Vol. 21, 3694] "A monumental work of research and investigation has now become a giant of a book. All the facts, all the statistics, presented in the best possible format . . . and . . . completely illustrated in black and white and full color. Every facet of the most controversial public report ever issued is covered in detail."

That is not quotations, but it seems to me to claim considerable social value.

> "This book is a MUST for research shelves of every library, public or private, seriously concerned

with full intellectual freedom and adult selection."

I am not sure that is a quote from the book but it does seem to offer considerable demand of social value.

> "Millions of dollars in public funds were expended to determine the PRECISE TRUTH about eroticism in the United States today, yet every possible attempt to suppress this information was made from the very highest levels."

Again I am not sure that is a quote from the book, but it seems to me to be presenting ideas that have social value.

> "Even the President dismissed the facts, out of [Vol. 21, 3695] hand."

I am not sure it is a quote from the book, but it is an accurate statement which does, you know, present social value arguments.

> "The attempt to suppress this volume is an inexcusable insult directed at every adult in this country. Each individual MUST be allowed to make his own decisions; the facts are inescapable. Many adults, MANY OF THEM, will do just that after reading this REPORT. In a truly free society, a book like this wouldn't even be necessary."

It seems to me that there is argument in this brochure about a very important social issue in our society, and that it is making a pitch that what it is advertising is of considerable social value, you know; that is the way I read it.

Q. Is that argument the dominant theme of that brochure, in your opinion?

A. Is it the dominant theme? Sexual materials and the concern about them in the Report, yes. I am not sure exactly what you mean by that question, but it appears so.

Q. So it is your testimony that regardless of whether or not the book involved is obscene, the advertisement does have social value?

[Vol. 21, 3696] A. It would seem to me, as I have testified before, that the brochure does not appeal to the prurient interest, is not contrary to community standards of offensiveness, of candor, and that the brochure as a whole does appear to me to appeal to ideas that are of considerable social value in our pluralistic society where people are arguing about social issues and about this one in particular.

The thing that makes me think that this is an important social issue is the amount of discussion that is given it in the press and in popular kinds of magazines and so on.

Q. Dr. Wilson, that is somewhat outside the scope of the inquiry.

A. Oh, all right.

Q. Looking at the other side of the coin, then, your opinion is that the ad has social value regardless of the attributes of the book. Now let's assume for the moment that you are correct in your opinion of the book and it does also have social value. That would, I assume, buttress your opinion in terms of social value for the advertisement, is that correct?

A. It would seem to me that as it advertises a book that has social value that it would—that this is also helpful—excuse me—in establishing its [Vol.

21, 3697] social value and to the extent that the book does present the kind of ideas that the brochure claims that it does, it would seem to me that the brochure is valuable.

Q. Let me ask you this. Would it be possible in your opinion to formulate an advertising brochure for sale of the Bible from which you just chose pictures that in the opinion of the draftsman if the advertising brochure effectively illustrated the activities, say, in the Song of Solomon, completely filled the brochure with pictures and in fine print at the bottom said, "This is an advertisement for the Bible", which we all must concede has some social value.

Would it be possible to formulate as an advertising brochure what you would consider to be obscene for a book that we would all assume is not obscene? Would that be possible at all?

A. Oh, I think it might be possible. I haven't engaged in this exercise, but it is conceivable.

Q. In other words, assuming the book does have social value, it would be possible to formulate an advertisement that would be obscene regardless of the attributes of the book?

A. It is possible, I think, yes.

Q. What would you do to that advertisement to [Vol. 21, 3698] transform it to an obscene advertisement?

MR. FLEISHMAN: Which one? The hypothetical one, Mr. Butcher?

BY MR. BUTCHER:

Q. The one we now have in front of us, Government's 2-A.

A. This one?

Q. Yes.

A. I don't know.

Q. In your opinion, Doctor, can anything be obscene?

A. I think it is possible that there is a category of material that is defined by the Supreme Court Judges as being—if things met these kind of criteria, it is a category that is not protected by the First Amendment and is obscene.

Q. Give me an example. Describe what you think would be an example of something that would meet all three elements.

A. I think to have all of these things coalescing restricts the content of this category quite considerably. It would seem to me that the Supreme Court did this knowingly.

Q. Right.

A. Trying to restrict the categories to a very [Vol. 21, 3699] small set of instances.

Q. My question is—

A. I don't know. If you would give a me a series of examples that you think might be, I would try to make a judgment as to whether these are obscene or not, in terms of these criteria.

Q. You are the expert and you would, I assume, have more—

A. (Interposing) I am an expert in whether a concrete material appeals to the prurient interest, is contrary to community standards, is offensive, and has no redeeming social value, and I do make these kinds of judgments when I am presented with a piece of

material. But I don't go out of my way to try to create these examples. I don't know. Maybe give me a while.

* * *

[Vol. 21, 3700] Q. And you can't recall having ever seen anything in the past two years in which all three elements would coalesce—that is, come together and all be simultaneously present?

* * *

[Vol. 21, 3701] A. I do not at this time remember a specific piece of material that might fit these, but I am not saying that I did not see such and would not make the judgment if I had material in front of me to judge.

* * *

[Vol. 21, 3721] REDIRECT EXAMINATION

BY MR. FLEISHMAN:

* * *

[Vol. 21, 3740] Q. Dr. Wilson, assuming that for a work to be obscene it must first have all been utterly without redeeming social value and it must appeal to prurient interest and it must patently offend community standards in the nation as a whole and go substantially beyond customary limits of candor; making that assumption, Doctor, do you have an opinion as to whether or not Exhibit 65, the Illustrated Report, is or is not obscene?

A. It is my own —

MR. BUTCHER: He has answered each one of those, one at a time, previous to this.

THE COURT: He is entitled to ask it.

THE WITNESS: It is my opinion that taking these three or four requirements to be legally obscene, that this Government's Exhibit 65 is not obscene.

BY MR. FLEISHMAN:

Q. And assuming the same set of hypotheticals with regard to what obscenity is and with regard to the brochure, do you have an opinion as to whether or not the brochure is or is not obscene?

A. It is my opinion that the brochure is not obscene.

VOL. 22

[Vol. 22, 3753] DWIGHT V. SWAIN,

* * *

DIRECT EXAMINATION

BY MR. FLEISHMAN:

* * *

[Vol. 22, 3857] Q. Professor Swain, I have handed you Government's Exhibit 2-A, being the brochure advertising the book in question. Do you have an opinion as to whether or not that brochure does or does not have any redeeming social importance?

A. I would say it has redeeming social importance.

Q. And will you tell the jury the reason for your answer, please?

A. This is an advertising brochure. The basic function of advertising is to inform. Therefore, it fulfills its function as advertising. It informs as to the content of a particular work and explains—gives a picture of what is going to be included in that work if a person orders it, reveals the very fact, the publication of the work, and in general provides infor-

mation which the person would not have if he had not examined the brochure.

MR. FLEISHMAN: I have no further questions, your Honor.

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VOL 23

[Vol. 23, 3922] VIRGINIA CARLSEN,

* * *

[Vol. 23, 3941] JACK HABERSTROH,

* * *

[Vol. 23, 3994] Q. Now, you have the advertisement in front of you? Have you seen the advertisement 2-A before?

A. Yes, I have, sir.

Q. Incidentally, Professor, in the courses you teach in your study in the field of journalism and advertising have you made any studies of the subject of whether or not sex is used in advertising?

A. Generally we discuss this in at least one or two class periods in my advertising class, and it seems to come up through the semester at one time or another and we have discussed it, as I recall, to a certain extent in Journalism 121 class, the Current Problems Course.

* * *

[Vol. 23, 4007] Q. In your opinion, Professor Haberstroh, does the advertisement referred to in 2-A go beyond or substantially beyond the areas in which you have found the purpose of advertising and as defined herein?

A. Certainly not.

* * *

[Vol. 23, 4019] CROSS-EXAMINATION

BY MR. BUTCHER:

* * *

[Vol. 23, 4038] REDIRECT EXAMINATION

BY MR. KATZ:

* * *

Q. You told us in answer to Mr. Butcher's question that the Exhibit 2-A has serious comment and you started to tell us about the statement, "Thanks a lot, Mr. President."

Is there anything else you saw in the advertisement [Vol. 23, 4039] that Mr. Butcher asked you about that indicated to you that the advertisement was a serious effort besides those words?

A. Well, I was going to go on and comment about the editorial statement on this part of the brochure, and I was just going to say one or two things about it.

First of all, it seems to me that this brochure is attempting to sell the book to the people that would be getting the brochure in a very serious way despite Mr. Butcher's comment about the pictures; and the comment, "Thanks a lot, Mr. President," seems to me refers to the fact that President Nixon disavowed the work of this Commission that had been working for two years gathering data on this subject, which in my view, at least, has enormous social significance, and I think that is the thrust of this, "Thanks a lot, Mr. President" headline, which is really a very serious comment and it is a commentary, really, on our administration.

Q. Was that one of the functions of advertising?

A. To do what? To make a comment?

Q. Yes, of social significance.

A. Well, I think if the advertisement can do that, [Vol. 23, 4040] in addition to selling a product, that is great — if it can do that.

Maybe this one does that.

* * *

RECROSS-EXAMINATION

BY MR. BUTCHER:

Q. One of the functions of an advertisement, as I recall, you state it is not to offer social commentary or interpretations or views but if it can do that, that is a good thing?

A. May I give you an example?

Q. Please do. Go right ahead.

A. It seems to me we have a lot of gaps in our society. One gap that I have noticed is the gap between policemen and students; okay?

Q. Well —

A. So I think that, you know, we ought to do what we can to close this gap. So I had my students design ads which would run in the Police Chief Magazine which would attempt to influence the police that indeed [Vol. 23, 4041] the students were not such bad guys; okay?

Now it seems to me in that regard—and these ads did run as full-page ads in this magazine called the Police Chief Magazine—we turned the assignment around later, but the point is, these advertisements in addition to selling a concept, indeed, that we should try to close up these kinds of gaps, did make a social comment.

Q. In other words, they were selling the concept; they were making a comment and in effect selling a concept, not a product?

A. They were selling a concept, true.

Q. What about—

A. (Interposing) The concept being that we ought to get closer together, that we ought to try to understand each other and communicate with each other.

Q. I understand.

Well, the offering, then, of social value judgments and editorial viewpoints—do you find that then to be a very integral part of the journalistic process in general, do you?

A. I think that those kinds of judgments are there, reflected in one's attitude on every subject, much less journalism—if I am answering [Vol. 23, 4042] your question.

* * *

[Vol. 23, 4043] RECROSS-EXAMINATION

BY MR. FLEISHMAN:

Q. Doctor, in answer to Mr. Butcher's question you stated that the advertisement, Exhibit 2-A, in addition to attempting to sell the book, was selling [Vol. 23, 4044] a concept. Do you recall that?

A. Yes, sir.

Q. What concept was being projected in the advertisement?

A. I think it probably is improper to take the advertisement isolated from the product it is selling and if I may, I think that we should think in terms of this particular advertisement selling this particular pub-

lication which has a message that seems to me we all ought to be listening to, no matter how we feel about it.

If we object to the present obscenity and pornography laws, or if we are in favor of the present obscenity and pornography laws, is immaterial. It seems to me that we should be listening to the message contained in this book, and that is really what I meant by advocating a position.

I am not sure that mail piece by itself advocates a position.

* * *

VOL. 25

[Vol. 25, 4187] OTTO N. LARSEN,

* * *

BY MR. FLEISHMAN:

* * *

[Vol. 25, 4242] Q. Now, Doctor, there is before you an envelope, a brochure. Will you please open the envelope and take a look at the brochure and tell us whether you have seen that brochure before.

A. Oh, yes, I have just seen it.

Q. When you say you have just seen it—

A. I saw it yesterday for the first time.

Q. And who showed it to you?

A. You did.

Q. Had you seen the book before then—of course.

A. Oh, yes, I purchased the book at a discount.

Q. Directing your attention now to the brochure, Exhibit 2-A, I believe is its number—do you have an opinion as to whether or not that [Vol. 25, 4243]

brochure does or does not have any redeeming social importance?

A. Yes, I have an opinion.

Q. And what is that opinion?

A. I believe it does have redeeming social importance.

Q. Why?

A. Well, essentially for the same reasons that I discussed in the book, but here I think is a little different context, in addition to that.

This is obviously an advertising brochure. Now in order to judge the importance of this one has to ask: What is the function of advertising in our society, its recognized function?

The function of advertising is to call our attention to objects that are available and to attempt to induce you to seek these objects, to purchase them.

This vehicle does precisely that. It tells us what this is all about. It represents material that is in the Illustrated version. It makes an argument for making the purchase. It tells us what it costs and how to do it and it protects us in the event by certifying a certain kind of signature?

[Vol. 25, 4244] There are certain kinds of claims that are made or protections that are made for the purchaser.

Q. What do you have reference to there? The jury doesn't have the brochure before it.

MR. BUTCHER: That is immaterial. It is in evidence.

THE COURT: Overruled.

BY MR. FLEISHMAN:

Q. Will you read what you had reference to just now, Doctor?

A. Well, when you order this you certify that you are over 21 years of age and that you desire the book solely for private contemplation in the privacy of my home and you sign your signature as well as print your name, and it seems to me that this is sort of making a kind of a commitment with yourself as to what this is all about.

I suppose—I would like to add one other thing about the context of advertising.

I think with respect to advertising in America we all recognize that advertising is sort of a shorthand of forthcoming events. We also recognize that advertisers take great liberty, I think, with shorthand. Sometimes they make excessive claims or [Vol. 25, 4245] strong claims.

My judgment is that this brochure, brief as it is, makes a strong claim in its statement about why the book should be purchased.

Q. What is the strong claim made?

A. Well, it tends to put what I think is a complex social issue, as I see it, into a kind of political framework and in so doing it reflects, I think accurately that original volume, the Government volume, was received negatively by political leaders and then it makes a statement that I personally would not have made as an advertising person, because I would hope to have sold some of this to Republicans as well as the Democrats.

I think this is a nonpartisan issue.

It says, "Even the President dismissed the facts out of hand," and that this is an inexcusable insult directed at every adult in this country.

I believe the President has a right to react in any fashion that he wants and I wouldn't try to make political capital — I think that is a strong statement and the issue is a social, family, community, moral issue. It is not a political issue, I believe, and therefore I think that is a very strong statement.

[Vol. 25, 4246] But I can see as an appeal of advertising it might attract someone's attention to find out what the President was objecting to.

Q. Do you have an opinion as to whether or not the brochure does or does not appeal to the prurient interest of the average person?

A. I have an opinion.

Q. What is that opinion?

A. I think it does not. Essentially for the reasons that I specified with the book. It is an accurate representation of what the social issue is. Whether one finds this issue distasteful or whatever else, there is some material with which to do it. It reflects it in a sampling sense, and I think that people as far as the full range of reactions to these materials that I have witnessed in these studies — a surprising range of reactions from approval to disapproval to disgust to everything else — is attached to these kinds of materials, not a unified reaction.

America is not polarized on the subject of explicit sexual material. It is granulated. There are all kinds of views even within one person who is willing to at-

tribute a full range of views to these. All kinds of interests — that is a fact and we have to deal with that fact.

[Vol. 25, 4247] Q. Do you have an opinion as to whether or not the brochure does or does not patently offend national standards with regard to the depiction or representation of matters pertaining to sex, nudity—

A. (Interposing) I have an opinion.

Q. What is that opinion?

A. My opinion is that it would not.

Q. Why?

A. Essentially also for the same reason that the book would, and with the additional factor that I think the tolerance level for what goes on in advertising is probably greater than in any other sector of American life given the vast experience we have had with this.

For instance, we have done research on advertising showing when advertising was first introduced in radio, compared to in the early period, toothpaste was considered offensive.

Today we have gone way beyond toothpaste on television and so forth and indeed most American people approve of ads on television. A minority is very vociferously opposed to it.

We have a great tolerance to advertising. We even trust used car dealers.

* * *

[Vol. 25, 4275] CROSS-EXAMINATION BY MR. BUTCHER:

* * *

[Vol. 25, 4301] Q. Dr. Larsen, you have before you Government's Exhibit 2, enclosed in which is Government's Exhibit 2-A, the advertising brochure.

A. Yes.

Q. Would you examine the brochure.

You drew specific reference on direct examination to the statement thereon. Would you read about the "I certify"?

A. "I certify by my signature below that I am 21 years of age or over and desire the book solely for my private contemplation in the privacy of my home."

Q. Your testimony, as I recall, was that this certification protects us. By that, the person signing it is making a kind of commitment to himself.

Could you explain what you meant by that, please?

A. I will try. I don't think that the writing of a signature or the printing of your name is [Vol. 25, 4302] an act that most people would take lightly. But I would concede that there are no sanctions about any violation of this attached to that thing, but I do think—this is the kind of device, and it is more than just a printing of your name, it is a matter of signature, and my guess is, and I really have nothing but just an estimate of this—that people don't attach their signature to things without some meaning. In that sense they are at least saying to themselves—and they may only be kidding themselves in this thing under some circumstances—that this is how I am going to use this.

Until it is demonstrated as done otherwise, I would be willing to accept that as I would accept your signature on a check or a statement until proven that it is not the case.

Q. What if you didn't see me sign the signature? Would that alter your opinion any?

A. I would be skeptical, but we accept signatures on petitions and other things. We don't watch each signature. I would be skeptical, to be sure, and I am not putting great weight on this. I am simply saying it is a unique device.

As far as I understand, it is a device that the people who are involved with these kinds of [Vol. 25, 4303] things are attempting to specify exclusions of the kind of persons that they don't want to get involved with this. How effective it is, frankly, I really don't know.

Q. Do you have any idea how old the youngsters are today when they learn to write in school?

MR. FLEISHMAN: Objection on the ground it is incompetent, irrelevant and immaterial.

THE COURT: Overruled.

MR. KATZ: Argumentative.

BY MR. BUTCHER:

Q. Do you have any idea how old youngsters are when they learn to write—I mean script, not print?

A. Oh, yes. I have four children. I think I could guess.

Q. I didn't learn until the third grade. Perhaps they are doing it sooner now. Perhaps you can enlighten us.

A. I think around the third grade. They do letters up to that point.

Q. By fifth or sixth grade, perhaps, they are rather competent, are they not? Do you have any in the sixth grade?

A. I have had four of them there. One is [Vol. 25, 4304] in the seventh, the youngest.

Q. They can write with some degree of competence, can they not?

A. Yes.

Q. How old is a person when they are in the sixth or seventh grade?

MR. FLEISHMAN: I will object. It is outside the scope of the inquiry. The question is, does it appeal to the prurient interest of the average person, an adult. There was no one other than an adult involved in this case and it is immaterial.

THE COURT: No, I don't think so, Mr. Fleishman. Overruled.

BY MR. BUTCHER:

Q. How old then?

A. Seventh grade. My seventh grader is 12 years old.

Q. A sixth grader might then be 11 years old?

A. That is correct.

Q. Maybe even 10 if he was born at the right time of the year?

A. Yes. Are you saying they could forge their signature or indicate—forge the age thing?

Q. By signing their signature I don't know that forgery would be the appropriate term. I am asking [Vol. 25, 4305] you, isn't it possible that someone could write their name on there and not be known to be only 10 or 11 years old?

MR. FLEISHMAN: It is incompetent, irrelevant and immaterial, contrary to the facts herein. Every

one of the addressees came before the court. There wasn't a 10 or 12-year-old came in.

MR. BUTCHER: If the Court please, the witness stated that certification protects us. It has to do with making of kind of commitment with yourself, and I was just trying to establish that most 10 or 11-year-olds—

THE COURT: Overruled. It is cross-examination.

BY MR. BUTCHER:

Q. Doctor, do you think most 10 or 11-year-olds have the same kind of commitment with himself about the gravity of signing a signature that, say, you or I would?

A. I find that—I really don't know the answer to that question, I guess. I find that with the youngsters that I have worked with—and I do a lot of work in schools—I am constantly refreshed by their candidness, honesty, and their positive attributes much more than I am the troublesome things.

I may be an optimist in this regard. [Vol. 25, 4306] There is a lot of basic honesty there, and don't underestimate it.

Q. Now then, let's get to the issue of what you spoke of earlier on direct examination, mass media, the salient features of which I think you stated were, 1) the intent of the communicator and 2) the impact of the message.

Is that basically your testimony regarding the mass media?

A. That at least anchors the two ends, the sender and the receiver. In between we have the channel and

after reception we have the impact as it relates to other people or to self, yes.

Q. And advertising, of course, falls within the generic classification of one of the mass media?

A. It is transmitted via the mass media. It is certainly a basic body of content in American mass communication.

Q. And you testified, did you not, Exhibit 2-A is an advertising piece?

A. An advertising what?

Q. An advertising brochure?

A. Yes.

Q. Flier, whatever you want to call it?

A. Yes. Quite similar to the one used in [Vol. 25, 4307] textbooks, as a matter of fact, in format.

Q. Would you explain that, please. I am in the dark on that.

A. Yes, I will be glad to.

By coincidence, as I said, I hadn't seen this until yesterday, but I can bring you from any files including my own book, the kinds of brochures that Harper and Rowe or McGraw Hill put out on textbooks. It often includes a montage of photographs that are used in the text and then a statement and then some kind of message, "This is what you need and here is where you get it."

It is usually two pages like this and it is in color and it is attempted to attract the attention of the viewer —obviously not the same content, but essentially the same kind of format.

There must be a profession of advertising who use each other's guidelines.

Q. They are attempting to attract attention to the publication by dwelling upon what the communicator presumably thinks is going to be of the greatest interest. Is that not correct?

A. I would assume so, or whatever he thinks will attract the greatest interest.

Q. And in this instance it is quite clear, is it not, that the communicator here was firmly [Vol. 25, 4308] convinced that explicit sexual material would attract the very most attention?

A. I would assume so and that is precisely what this volume is all about, explicit sex material.

Q. Do you have an idea—

A. In words and pictures.

Q. Is there any strong emphasis, or as a matter of fact, is there any emphasis at all in Government's Exhibit 2-A laid to the issue of the textual material in this Government's 65, or is all the emphasis laid on the photographic depictions included therein?

A. Well, certainly in terms—if you want to measure in terms of space, obviously the photographs take up one-half of the whole document. Right?

But if you will read the words—

Q. I have.

A. —you will see that the emphasis also in terms of the monumental work of research and investigation, and the other issue that underlies this whole thing of the right of someone to have access to this and make up their own mind, which may be in fact the critical basic issue at stake—some people think it is—so I think there is some reference here to it but is it very clear, yes, in terms of space.

[Vol. 25, 4309] But again, what is the impact? What do people see when they see this? Some people would be probably more upset about the statement of the President than they would about the pictures.

Q. I was going to ask you — you mentioned six words: monumental work of research and investigation. Is that your opinion as to what the impact of the advertising brochure is? Is it more fair to say that the overwhelming impact of the advertising brochure is one of graphic sexually oriented materials of the most explicit nature?

A. To judge that I would refer again to the tremendous variability of that impact.

We had measures of impact that people give when they respond to the varieties of pictures of this sort, and since you put the question in terms of impact, we have to turn to the audience, and the arbiter of the question is the audience response and the answer there is, variability.

I find many of these things disturbing, et cetera. Some people do and some people don't. It is highly variable by type.

The data are available in the book for you to see. It is important to understand, unpleasant as it may be. It is a social fact.

[Vol. 25, 4310] Q. Would you describe the photographs included on the inner portion of Government's 2-A as explicitly erotic material?

A. Explicitly erotic material? Yes, I would. I certainly would. Explicit sexual material.

In our reports we used the phrase "erotic material" and "explicit sexual material" as synonymous. I would call it that.

Q. "Explicit erotic material"?

A. Well, that is a little bit redundant. We use either erotic or explicit sexual material.

Q. I see. So if it is erotic it is by definition explicit sexual material?

A. Yes, I would think so, the manner in which we used it, at least.

Q. Would you go to Page 238, Doctor, in the middle column, about halfway down, disregarding the middle column now.

A. All right.

Q. Disregarding the three lines, that paragraph at the top. Then there is another full paragraph and finally a full paragraph beginning with: "A review of that business . . ."

A. Yes.

Q. Then down about eight or ten lines there is a [Vol. 25, 4311] sentence beginning with "Moreover . . ."?

A. Yes.

Q. It states:

> "Moreover, most mailers now place a warning on their envelopes, and the most explicitly erotic material is sold in special bookstores."

A. I have engaged in the very redundancy that I call your attention to there, yes, that is correct.

Q. In any event, were you saying that explicitly erotic material is sold only in the special bookstores or

were you also including mailing envelopes, that explicit erotic materials are also sold through mailing envelopes?

A. Just a moment, let me read this.

If I understand your question, I would think both, that explicit, erotic sexual materials are available in bookstores and available by mailings. At least that is what we found in our Commission studies and that is the material that we saw. We saw both channels, what went into both channels. They are very explicit, as explicit as this material I am showing you here now.

Q. And you wrote here, did you not, that:

[Vol. 25, 4312] "Moreover, most mailers now place a warning on their envelopes . . ."

A. Yes.

Q. Would you examine Government's 2-A and read the warning for me there.

A. Unless it is covered by Government's—

Q. I can assure you it is not.

A. I assume not. I do not see any such warning on this envelope.

Q. Would you examine the interior of Government's 2 and see if you find, for instance, an inner envelope carrying that message.

A. I have the envelope. I see no such message.

Q. That in fact is a pre-addressed return envelope, is it not?

A. Yes, to Library Services, Inc.

Q. So in fact the person who opened that envelope had no idea what was inside, did he, or she, in this case?

A. . . . had no idea until it was opened, correct, although I am beginning to get a sensitivity to these things. I wouldn't be able to know until I opened it.

Q. You drew reference under direct [Vol. 25, 4313] examination by Mr. Fleishman—you drew reference to Color Plate XX, I believe. Go to that Color Plate.

A. What page does it follow, please?

Q. It is in that section where XVII was also, the one we talked about a moment ago. The next section of color plates.

A. Yes.

MR. FLEISHMAN: If the Court please, I will object to the question. I was the one who drew attention to it, not the witness. Misstatement of the evidence.

BY MR. BUTCHER:

Q. All right. Mr. Fleishman drew your attention to Color Plate XX.

A. Page 288?

Q. Yes, immediately following Page 288.

A. Yes. Wait a minute. Color Plate XX, the "Animal 2."

Q. Yes.

A. Okay.

Q. Do you recall testifying about that or do you recall testifying relative to Color Plate XX?

A. Yes.

Q. And your testimony in substance, was it not, was that materials similar to this you had brought [Vol. 25, 4314] before the Commission?

A. Yes.

Q. And you testified, did you not, that you found the material in Copenhagen?

A. Yes.

Q. And did you ever buy any of it here in the United States, material of this type depicting bestiality?

A. I have seen it for sale. I have not purchased it personally.

Q. Can you tell us where you have seen it for sale and when?

A. Yes. As recently as—well, within a few months in Washington, D.C., about six blocks from the White House.

Q. Do you know the name of the bookstore, by the way?

A. No, I don't

In Honolulu in April. I don't know the names of the stores, in several stores.

Q. And it was right in front of the counter, is that correct?

A. Not on the counter. On a rack.

Q. On a rack?

A. Yes, face out, and in Seattle, Washington.

[Vol. 25, 4315] Q. This, too, was an adult bookstore?

A. Yes.

Q. Did you ever see any of this material in a drugstore, say?

A. Never in the United States. In fact, the adult bookstore operators I find are very strict on age credentials and so on and information concerning it is rarely available.

Q. Did you ever see this type material in newsstands in a hotel, say?

A. In the United States?

Q. Yes.

A. No, I have not.

Q. How about in the book department of a department store?

A. No, I have not.

Q. You are at the University of Washington, are you?

A. Yes.

Q. How about the University of Washington Bookstore or any collegiate bookstore in the United States—

A. Let's see. Not these bookstores, but to the extent that this book may be available in such [Vol. 25, 4316] places.

Q. May be. I am talking about now, "Animal 2 Bizarre."

A. No, I have not. I have not seen it. The only place I have seen it is in adult bookstores. That is the only place I have seen it in the United States.

Q. And because it appears in such places as adult bookstores it is your opinion, is it not, that the national community standards is not substantially exceeded by the depiction of this material?

MR. FLEISHMAN: Objection to the question as a misstatement of the evidence. The witness did not rely on that. He relied upon the national survey and the research project he is referring to.

THE COURT: Overruled. That was part of his opinion but his opinion is his opinion irrespective of what it is based on.

THE WITNESS: I would like to state it myself if you don't mind.

BY MR. BUTCHER:

Q. Go right ahead.

A. Would you phrase the question again?

Q. Based, then, on the fact, among others, I suppose—let me reframe it.

[Vol. 25, 4317] Bearing in mind that you have never seen material such as that depicted on Color Plate XX in drugstores, department store book departments or collegiate bookstores or in hotel newsstands, is it still your testimony that materials similar to Government's 2-A is not substantially in excess of the national contemporary community standards in dealing with matters pertaining to sex and nudity?

A. I would like to answer that yes and I would like to, if I may, explain.

Q. You certainly may.

A. Okay. I said it was my opinion, and my opinion is based on the responses that were given to material in the national survey and of the studies.

I cannot testify that this exact material was so represented because, as a matter of fact, the reason I became concerned about this, I find this, as you probably do, very strong material and personally don't like it, let me add. But I do know that it is part of the product that is available and it doesn't minimize its reality that it is available in adult bookstores because things that are purchased there also circulate. It is available. These things do sell and it was also, I think, part of the evolution of explicitness.

[Vol. 25, 4318] When I came across it in the form that I did — it was the practice of the Commission to bring new material to the attention of the Commission. We had seen some like this. We had not seen it in this particular package, and that is what I did.

Part of the reality, the evolution of this material; it exists whether I like it or not — and I don't.

There is curiosity about it, all kinds of curiosity about these things, and there is evidence from that in the history of the evolution of so-called pornographic literature in written form as well. It is an ancient theme now made in color photographs. Is there a tolerance for it? There is a curiosity about it. There are purchases of it.

I am not trying to state that everybody is mad about it or anything of that sort. I am merely saying there is a tolerance for it, and along the same grounds of reasoning that we use from the national survey as to what people will tolerate. I would not expect 30% of the adults to tolerate sadomasochistic literature—the right to access to that, but they did, and without harm.

* * *

VOL. 26

[Vol. 26, 4359] MR. FLEISHMAN: Thank you, your Honor.

If your Honor, please, subject to some rulings on evidence that are before the Court and other matters, the defendants rest. All of the defendants rest.

THE COURT: All right.

[Vol. 26, 4360] Mr. Butcher, do you have any rebuttal at this time?

MR. BUTCHER: May I have a few moments, your Honor?

THE COURT: All right.

MR. BUTCHER: Do I understand that all the defendants rest at this time?

MR. FLEISHMAN: You understand correctly, yes, all the defendants.

THE COURT: Is that correct, Mr. Katz?

MR. KATZ: That is correct, your Honor, except for evidentiary matters.

THE COURT: You mean except for the hearing on the physical evidence?

MR. KATZ: Yes.

THE COURT: For the admission of physical evidence.

MR. KATZ: For the admission of physical evidence. We have no testimony to put on at this time.

MR. BUTCHER: The Government would have no rebuttal, your Honor.

* * *

[Vol. 26, 4364] THE COURT: All right. Let the record show that all defendants are present with their respective counsel, that the jury is not present. This is the time with respect to any argument had on the introduction of evidentiary matters, physical evidentiary matters.

You may proceed, Mr. Fleishman.

MR. FLEISHMAN: If the Court please, I would like to start, if I may, with Exhibit A, which was marked when we were all strangers one to the other. That is the *Pinkus* Film, as the Court will recall. That

was a motion picture film found to be not obscene by the Ninth Circuit and then affirmed by an equally divided United States Supreme Court.

We would like to have that film [Vol. 26, 4365] introduced in evidence for the purpose of aiding the jury in knowing the kind of material finally adjudicated as being protected by the First Amendment.

We believe that film is comparable in the sense and only in the sense, your Honor, that it deals explicitly with an aspect of frank sexuality.

I believe that a jury might find from seeing the film that it is sexually more arousing than the material before the Court, and the jury would be able to possibly —probably, in our opinion—use it for purposes of making comparisons with regard to material which has finally been adjudicated as being not obscene.

Now within that framework, your Honor—if this is not out of order—I would like to have marked as Exhibits A-1 and A-2, two magazines that were found to be not obscene by the United States Supreme Court while this case was going on. It is the case marked here. It is the case in South Carolina where the United States Supreme Court found both of those publications to be not obscene. By citing *Redrop*, and just so we don't have any quarrel in terms [Vol. 26, 4366] of language used, the Supreme Court reversed *Redrop v. New York*, which I believe everybody agrees—or almost everybody agrees—that the material could not be found to be obscene under any constitutional test.

In any event, your Honor, I would like to have those marked as A-1 and A-2 with the representation

that those are true and correct copies of the publications involved in the case which is set forth on the margin of the front page thereof.

THE COURT: Is this both in the same case?

MR. FLEISHMAN: Yes, your Honor. The name of the case is on the margin—Burgin.

THE COURT: They may be marked. I am not going to permit them into evidence, Mr. Fleishman, but they may be marked. Nor am I going to permit the film in evidence. It may, however, be marked. It already is marked?

MR. FLEISHMAN: Yes, your Honor. So actually we would then have 3-a.

THE COURT: I am going to go down this. You have A, A-1 and A-2.

MR. FLEISHMAN: Yes, your Honor. Perhaps for the record, if it is convenient, let me [Vol. 26, 4367] identify those two publications a little more precisely.

THE COURT: I just put "Books, per *Burgin v. U.S.*"

MR. FLEISHMAN: One of them is entitled—a magazine—"Togetherness."

The other is "Flesh and Fancy."

Both of those are referred to in the Lower Court opinion, so I think it would tie in.

THE CLERK: "Fantasy."

MR. FLEISHMAN: I am sorry, "Flesh and Fantasy."

THE COURT: Could I have the spelling of that case, please, Mr. Clerk. It is right on the bottom cover there.

THE CLERK: *B-u-r-g-i-n vs. South Carolina.*

MR. BUTCHER: Which one is "Togetherness"?

THE CLERK: A-1. Will that be marked as to both cases?

MR. FLEISHMAN: Both cases.

THE CLERK: And A-2 is "Flesh and Fantasy."

(Defendants' Exhibits A-1 and A-2 marked for identification.)

MR. FLEISHMAN: And the offer, for the record, would be with regard to the customary [Vol. 26, 4368] limits of candor, with regard to prurient interest, and with regard to the social value.

THE COURT: Well, that again comes within the purview of the *Pinkus* case and of the other matters of comparables which I have ruled on.

MR. FLEISHMAN: Just for the record, then, we would renew our offer with regard to the publication, "Nude Living," your Honor.

This has a twofold purpose. One is for the trial itself. This is Exhibit II, and it is "Nude Living, No. 63."

The Court will recall that this publication first was presented in connection with the subpoena duces tecum that we had served with regard to second class mailing privileges.

This publication does have second class mailing privileges.

We believe it is admissible for purposes of the jury, first of all, on the ground that the Post Office Department, having afforded second class mailing privileges to the magazine, and not having taken any action

to withdraw it, is some indication of acceptability and is relevant and competent on all of the issues [Vol. 26, 4369] with regard to obscenity. So we would renew it for that purpose.

THE COURT: It is marked.

MR. FLEISHMAN: It is also in connection with our objection to the quashing of the subpoena on the second class mailing material, your Honor.

THE COURT: Very well. That has heretofore been denied admission and it is denied now.

* * *

[Vol. 26, 4370] If the Court please, the next document I would like to address myself to are Exhibits QQ and RR. The Court will recall that these publications were first presented to Mr. Getlein in which he testified that some of the illustrations found in either of the magazines—my memory is not precise, but that some of the pictures in at least one of the magazines and possibly both—were similar to material that he had found in the adult book stores in his informal survey and that some of the pictures were not bound in publications in these adult book stores.

We also showed these publications—your Honor will recall—to the witness Dr. Cody Wilson, who testified that with regard to the illustrations that Mr. Getlein said were not available in the adult book stores, Dr. Wilson said that they were, so that there was testimony by a Government witness and by a defense witness concerning these two publications and in terms of the jury even understanding or having the [Vol. 26, 4371] wherewithal to understand the testimony, we would

respectfully submit that those two publications should be admitted. Otherwise, the testimony in the area of the dispute really between the two witnesses will be unknown and unknowable by the jury.

We would also offer them through Dr. Wilson as reflective of what is within customary limits of candor, what is reasonably accepted within the community.

He testified, the Court will recall, that those two publications were reasonably accepted in the community and therefore it meets the condition, very strict condition of admissibility of comparables.

The cases have always held, your Honor, that if you have an expert witness who is able to jump that very difficult hurdle and has enough information with regard to what is reasonably acceptable, then the material that he testifies about would be admissible.

In the *Jacobs* case, the court said there wasn't an expert who was able to bridge that gap. Here we do have and did present to the Court the expert that bridges the gap.

[Vol. 26, 4372] Now I know your Honor is not bound by anything said earlier in the trial or anything like that, but the Court did kind of hold out the possibility that maybe we would be able to get two, three, or four publications before the jury, not more—but we don't even want three or four, your Honor, just two. So it seems to me that such a modest request has to be looked on favorably and therefore we would move into evidence those two publications since there has been a proper foundation laid and it would be extremely helpful to the jury in terms of evaluating the testimony of

both the Government witness and the defense witness who testified about those two publications.

THE COURT: No, I am not going to allow those in. That motion is denied.

* * *

THE COURT: Well, now, wait a minute. Let's get them down here; BC—

MR. FLEISHMAN: Yes.

THE COURT: What is the name of that?

MR. FLEISHMAN: That is a publication entitled, "Deviant Sexual Behavior," [Vol. 26, 4373] BD, a publication entitled, "The Advanced Handbook of Oral Sex," color illustrated, and BE, a publication entitled, "Screw, the World's Greatest Newspaper," and on the top it says, "Do Hairy Men Make the Best Lovers?"

Those, your Honor, were similarly testified to, but they would follow with and be covered by your Honor's ruling to the prior.

THE COURT: Those will be denied. They may be marked for identification.

MR. FLEISHMAN: They have been marked.

THE COURT: But they are denied admittance.

* * *

[Vol. 26, 4412] MR. FLEISHMAN: Yes, your Honor. We have a motion pursuant to Rule 29 for a judgment of acquittal.

THE COURT: All right.

* * *

MR. KATZ: We rest subject to the right to make motions, your Honor.

THE COURT: All right. Make your motion.

[Vol. 26, 4432] Mr. Katz?

MR. KATZ: Thank you. I will try and be brief, your Honor, but I do feel that what Mr. Fleishman has said is very important at this stage of the case.

I, of course, join in the motion to dismiss as to my three clients and I won't discuss the question of obscenity any further. I think Mr. Fleishman has covered it very adequately.

* * *

[Vol. 26, 4441] THE COURT: Let the record show that the defendants are present with their counsel and that the Government attorney is present, that the jury is not present.

I have reviewed your motion, Mr. Fleishman [Vol. 26, 4442] and Mr. Katz, and while perhaps there is a substantial difference in the evidence numerically and in the content, nevertheless the quality and weight to be given to the evidence is not for this Court to determine at this time but for the trier of the fact, the jury, to determine.

It is the Court's position that there is sufficient evidence upon which a jury could find these defendants guilty of the charges set forth in the Indictment and therefore the motions are denied.

* * *

VOL. 29

[Vol. 29, 4915] THE COURT: Let the record show that all twelve jurors are present; that the alternate is present; that all Defendants are present with their respective Counsel and the Government is present.

Members of the Jury: Now that you have heard the evidence and the arguments, it becomes my duty to give you instructions of the Court as to the law applicable in this case.

It is your duty as jurors to follow the law as stated in the instructions of the Court and to apply the rules of law so given to the facts as you find them from the evidence in the case.

You are not to single out one instruction alone as stating the law, but you must consider the instructions as a whole. Neither are you to be concerned with the wisdom of any rules of law stated by the Court. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given to you in the instructions of this Court, just as it would be a [Vol. 29, 4916] violation of your sworn duty as Judges of the Facts to base a verdict upon anything but the evidence in the case.

Justice through trial by Jury, must always depend upon the willingness of each individual juror to seek the truth as to the facts from the same evidence presented to all the jurors and to arrive at a verdict by applying the same Rules of Law as given in the instructions of the Court.

You have been chosen and sworn as jurors in this case to try the issues of fact presented by the allegations in the Indictment, and you will recall there are two separate Indictments, and the denial made by the

Not Guilty pleas of the accused. You are to perform this duty without bias or prejudice as to any party.

The law does not permit jurors to be governed by sympathy, prejudice, or public opinion. Both the accused and the public expect that you will carefully and impartially consider all the evidence in the case, follow the law as stated by the Court, and reach a just verdict regardless of the consequences.

In determining the guilt or innocence of the Defendants, you will be governed solely by the evidence presented during the course of the trial. You must [Vol. 29, 4917] determine the facts only from the evidence received in Court. You must not consider as evidence any statement of Counsel made during the course of the trial. However, if Counsel for the Government and Counsel for the Defendants have stipulated to any fact, you will regard that fact as being conclusively proved.

An Indictment is only a method of accusing a Defendant of a crime. It is not evidence and you are not to infer from it that a Defendant or Defendants are more likely to be guilty than to be innocent. The law presumes each of the Defendants to be innocent of crime; thus, each Defendant, although accused, begins the trial with a clean slate, with no evidence against him, and the law permits nothing but legal evidence presented before the Jury to be considered in support of any charge against the accused.

So, the presumption of innocence alone is sufficient to acquit a Defendant unless the jurors are satisfied

beyond a reasonable doubt of the Defendants' guilt after a careful and impartial consideration of all of the evidence in the case.

It is not required that the Government prove guilt beyond all possible doubt. The test is one of [Vol. 29, 4918] reasonable doubt. A reasonable doubt is a doubt based upon reason and common sense, the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt must therefore be proof of such a convincing character that you would be willing to rely and act upon it unhesitatingly in the most important of your own affairs.

The Jury will remember that a Defendant is never to be convicted on mere conjecture or suspicion. The burden is always upon the prosecution to prove each and every element of the crime charged beyond a reasonable doubt. This burden never shifts to a Defendant, for the law never imposes upon a Defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

A reasonable doubt exists whenever, after a careful and impartial consideration of all of the evidence in the case, the jurors do not feel convinced to a moral certainty that the Defendants are guilty as charged.

You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves. You should carefully scrutinize all the testimony given, the circumstances under which each witness has testified, and every matter in evidence [Vol. 29, 4919] which tends to show whether a witness is worthy of belief. Consider each witness' intelligence, motive, and

state of mind and demeanor and manner while on the witness stand. Consider the witness' ability to observe the matters as to which he has testified and whether he impresses you as having an accurate recollection of these matters. Consider also any relation each witness may bear to either side of the case, the manner in which each witness might be affected by the verdict, and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness or between the testimony of different witnesses, may or may not cause the Jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently. An innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or to an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

After making your own judgment, you will give the testimony of each witness such credibility, if any, [Vol. 29, 4920] as you may think it deserves.

The weight of the evidence is not necessarily determined by the number of witnesses testifying on either side. You should consider all the facts and circumstances in evidence to determine which of the witnesses are worthy of greater credence. You may find that the testimony of a smaller number of witnesses on one side is more credible than the testimony of a greater number of witnesses on the other side.

The law does not compel a Defendant in a criminal case to take the witness stand and testify, and no presumption of guilt may be raised and no inference of any kind may be drawn from the failure of a Defendant to testify. As stated before, the law never imposes upon a Defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

Now, throughout this case, there have been many expert witnesses testifying. With respect to the opinions of expert witnesses, the rules of evidence ordinarily do not permit witnesses to testify as to opinions or conclusions. An exception to this rule exists as to those whom we call "expert witnesses." Witnesses who, by education and experience, [Vol. 29, 4921] have become expert in some art, science, profession, or calling, may state an opinion as to relevant and material matter in which they profess to be expert, and may also state their reasons for that opinion.

You should consider each expert opinion received in evidence in this case and give it such weight as you may think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience or if you should conclude that the reasons given in support of the opinion are not sound, or that the opinion is outweighed by other evidence, you may completely disregard the opinion of that witness.

During the course of the trial, I occasionally ask questions of a witness in order to bring out facts not then fully covered in the evidence and in the testimony. Do not assume that I hold any opinion on the matters

to which my questions may have related. Remember at all times that you as jurors are at liberty to disregard all comments of the Court, except my instructions of the law, in arriving at your own findings as to the facts in this case.

The testimony of a witness may be discredited or impeached by a showing that he previously made [Vol. 29, 4922] statements which are inconsistent with his present testimony. The earlier contradictory statements are admissible only to impeach the credibility of the witness and not to establish the truth of these statements.

It is the province of the Jury to determine the credibility, if any, to be given the testimony of a witness who has been impeached. If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such witness' testimony in other particulars, and you may reject all the testimony of that witness or give it such credibility as you think it deserves.

There are, generally speaking, two types of evidence from which a Jury may properly find the truth as to the facts of a case. One is direct evidence, such as the testimony of an eyewitness. The other is indirect or circumstantial evidence, the proof of a chain of circumstances pointing to the existence or non-existence of certain facts.

As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that the Jury find the facts in accordance with

all the evidence in the case, both [Vol. 29, 4923] direct and circumstantial.

If the evidence in this case is susceptible of two constructions or interpretations, each of which appears to you to be reasonable and one of which points to the guilt of the Defendant and the other to his innocence, it is your duty under the law to adapt that interpretation which will admit of the Defendant's innocence and reject that which points to his guilt.

(Indictments read, Case No. 10791—Case No. 11971.) (Title 18, Section 1461, United States Code read.)

This statute was enacted under the power of Congress to establish and operate and regulate the Post Office establishment of the United States of America.

Now, with respect to the law of conspiracy, as that is the first charge:

A conspiracy is a combination of two or more persons by concerted action to accomplish some unlawful purpose or to accomplish some lawful purpose by unlawful means. So, a conspiracy is a kind of partnership in a criminal purpose in which each member becomes an agent of every other member.

The gist of the offense is a combination or agreement to disobey or to disregard the law. Mere similarity of conduct among various persons and the [Vol. 29, 4924] fact that they may have associated with each other or may have assembled together and discussed common aims or interests, does not necessarily establish proof of the existence of a conspiracy.

However, the evidence in the case need not show that the members entered into any express or formal agreement, or that they directly by word spoken, or in writing, stated between themselves what their object or purpose was to be or the details thereof, or the means by which the object or the purpose was to be accomplished.

What the evidence in the case must show beyond a reasonable doubt in order to establish proof that a conspiracy existed, is that the members in some way or manner, or through some contrivance, positively or tacitly, came to a mutual understanding to try to accomplish a common and unlawful plan.

The evidence in the case need not establish that all the means or methods set forth in the Indictment were agreed upon to carry out the alleged conspiracy, nor that all the means or methods which were agreed upon were actually used or put into operation, nor that all the persons charged to have been members of the alleged conspiracy were such.

What the evidence in the case must establish [Vol. 29, 4925] beyond a reasonable doubt is that the alleged conspiracy was knowingly formed and that one or more of the means or methods described in the Indictment were agreed upon to be used in an effort to effect or accomplish some object or purpose of the conspiracy as charged in the Indictment and that two or more persons, including one or more of the accused, were knowingly members of the conspiracy as charged in the Indictment.

In order for one to be guilty of a conspiracy, there are four essential elements that are required to be proved to establish the offense of conspiracy as it is charged in the Indictment;

The first is, that the conspiracy described in the Indictment was wilfully formed and was existing at or about the time alleged;

Secondly, that the accused wilfully became a member of the conspiracy;

Third, that one of the conspirators thereafter knowingly committed at least one of the overt acts charged in the Indictment at or about the time and place alleged; and

Fourth, that such overt act was knowingly done in furtherance of some object or purpose of the conspiracy as charged in the Indictment.

[Vol. 29, 4926] If the Jury should find beyond a reasonable doubt from the evidence in the case, that the existence of a conspiracy as charged in the Indictment has been proved, and that during the existence of the consipracy one of the overt acts alleged was knowingly done by one of the conspirators in furtherance of some object or purpose of the conspiracy, then proof of the conspiracy offense charge is complete, and it is complete as to every person found by the Jury to have been wilfully a member of the conspiracy at the time the overt act was committed, regardless of which of the conspirators did the overt act.

As stated before, the burden is always upon the prosecution to prove beyond a reasonable doubt every

essential element of the crime charged, and the law never imposes upon the Defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

One may become a member of a conspiracy without full knowlege of all the details of the conspiracy. On the other hand, a person who has no knowledge of a conspiracy, but happens to act in a way which furthers some object or purpose of the conspiracy, does not thereby become a conspirator.

Before the Jury may find that a Defendant or [Vol. 29, 4927] any other person has become a member of a conspiracy, the evidence in the case must show beyond a reasonable doubt that the conspiracy was knowingly formed and that the Defendant or Defendants, or other person who is claimed to have been a member, wilfully participated in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy.

To act or participate wilfully means to act or participate voluntarily and intentionally and with the specific intent to do something the law forbids or with the specific intent to fail to do something the law requires to be done; that is to say, to act or participate with bad purpose, either to disobey or to disregard the law. So, if the Defendant or any other person, with understanding of the unlawful character of the plan, knowingly encourages, advises, or assists for the purpose of furthering the undertaking or scheme, he thereby becomes a wilful participant, a conspirator.

One who wilfully joins an existing conspiracy is charged with the same responsibility as if he had been one of the originators or instigators of the conspiracy.

In determining whether a conspiracy existed, [Vol. 29, 4928] the Jury should consider the actions and declarations of all of the alleged participants. However, in determining whether a particular Defendant was a member of the conspiracy, if any, the Jury should consider only his acts and his statements. He cannot be bound by the acts or declarations of other participants until it is established that a conspiracy has existed and that he was one of its members.

In your consideration of the evidence in this case, as to the offense of conspiracy charged, you should first determine whether or not a conspiracy existed at all, as alleged in the Indictment. If you conclude that a conspiracy did exist, you should next determine whether or not the accused, all of them or any of them, wilfully became a member of the conspiracy, and when I say the accused, I am including not only the four Defendants here, but the Defendants that are Corporate Defendants.

If it appears beyond a reasonable doubt from the evidence in the case that the conspiracy alleged in the Indictment was wilfully formed, and that the Defendant or Defendants wilfully became a member of the conspiracy, either at its inception, or afterwards, and that thereafter one or more of the conspirators knowingly committed one or more overt acts in furtherance of [Vol. 29, 4929] some object or purpose of the conspiracy, then there may be a conviction even though

the conspirators may not have succeeded in the accomplishment of their common object or purpose and, in fact, failed in so doing.

The extent of any Defendants' participation, moreover, is not determinative of his guilt or innocence. A Defendant may be convicted as a conspirator even though he may have played only a minor role in the conspiracy.

An overt act is an act knowingly committed by one of the conspirators in an effort to effect or accomplish some object or purpose of the conspiracy.

The overt act need not be criminal in nature if considered separate and apart from the conspiracy. It may be as innocent an act as a man walking across the street, or driving an automobile, or using a telephone. It must, however, be an act which follows and tends toward accomplishment of the plan or scheme and must be knowingly done in furtherance of some object or purpose of the conspiracy charged in the Indictment.

Now, leaving Count 1 of the Indictment Number 10791, which is the San Diego case, and going to the Indictment which is in two counts, the Dallas case, [Vol. 29, 4930] which is our Number 11971 consolidated for trial, you are instructed that this Indictment charges in two counts a violation of Section 1462 of Title 18 of the United States Code and this Section 1462, Title 18 provides in pertinent part as follows:

"Whoever brings into the United States or any place subject to the jurisdiction thereof, or knowingly uses

any express company or other common carrier for carriage in Interstate or Foreign Commerce, any obscene, lewd, lascivious or other filthy book, pamphlet, picture, motion picture film, paper, letter, writing, print or other matter of indecent character, shall be guilty of an offense against the Laws of the United States."

I have informed you as to the Conspiracy Count, as to the Dallas Count. Now, cutting across both Indictments, the essential elements required to be proved beyond a reasonable doubt in order to establish the offense charged in Counts 2 through 5—this is the advertisement count—Counts 7 through 13, again the advertisement count, and Counts 19 and 21. Now, when I refer to these counts, I refer to Counts 2 through 5. These are the counts that allege that the advertisement itself is obscene.

Counts 7 through 13 allege that the advertisement [Vol. 29, 4931] itself is obscene.

Count 19 and Count 21 allege that the book is obscene—

This leaves out the where, when and so forth—as well as in Counts 1 and 2 of the Indictment 11971.

Now, those are the counts that I just read you, the Common Carrier Counts. These essential elements are required to be proved beyond a reasonable doubt in order to establish the offenses in those counts that I have now just told you about:

First, in No. 10791, the San Diego case, the first element is:

That the Defendants willfully deposited or caused to be deposited in the mail, or, in the case of the Texas

case, No. 11971, that the Defendants willfully deposited or caused to be transported in Interstate Commerce via a common carrier, envelopes or packages containing certain materials.

The second element: Going to both Indictments that the Defendants had knowledge of the nature and character of the contents of the envelopes or packages at the time the materials were caused to be transported in Interstate Commerce, the Dallas case via common carrier, or, were deposited in the mail for delivery in the San Diego case.

[Vol. 29, 4932] The third element: That the materials were obscene under the test which I will give you shortly.

Those are the elements that you are to apply. I have already instructed you regarding the elements of the offenses charged in Counts 2 through 5—that is the advertisement count—alleging that the advertisement itself is obscene; Count 7 through 13 alleging that the advertisement itself is obscene; Counts 19 and 20—all of the San Diego case—alleging that the book is obscene and I have also now charged you with respect to the elements of the Dallas case, No. 11971.

Now, with respect to the elements charged under Counts 15, 16 and 17 of the San Diego case, No. 10791, these are somewhat different. Before you can convict any Defendant under any of these counts, Counts 15, 16 and 17, the Government must prove beyond a reasonable doubt the following:

1) That he knowingly used or caused to be used the mails for carriage in the mail of the envelope in

question and its contents. That is the envelope that carried the advertisement;

2) That the envelope contained a printed advertisement giving information where, how, and from whom —and by what means, the Illustrated Presidential [Vol. 29, 4933] Report of the Commission on Obscenity and Pornography might be obtained; and

3) That the book about which the information was given was, in fact, obscene.

In this regard, you are to be guided by the instructions which I give you for the purpose of arriving at a determination of whether or not the book is, in fact, obscene.

I further instruct you, however, that it is not an element of the offense charged in Counts 15, 16 and 17, that the advertisement itself is obscene, and this is true even though other identical brochures are, in fact, charged as being obscene in Counts 2 through 5 and Counts 7 through 13.

Now, what that means is this. If the book is determined to be obscene—and if you determine that the advertisement meets these tests that I have just stated beyond a reasonable doubt, then the Defendants would be guilty as charged.

If, on the other hand, the book is determined not to be obscene, there is no way that the Defendants could be convicted of Counts 15, 16 and 17, even if you believed the advertisements themselves to be obscene.

On the other hand, if you believe the advertisements [Vol. 29, 4934] themselves to be obscene, the book not

to be obscene, then the Defendants would be guilty of Counts 2 through 5 and Counts 7 through 13 and then the conspiracy charge, Count 1, as I have instructed you, is an entirely different charge.

The statute involved here prohibits the mailing of any obscene, lewd, lascivious, indecent, filthy and vile material.

The jury is instructed that the words "lewd," "lascivious", "indecent", "filthy" and "vile", do not add to the class of material established as non-mailable by the word "obscene". In other words, under the law, the words, "lewd", "lascivious", "indecent", "filthy" and "vile" and "obscene" are deemed synonymous, and if the material is not obscene, as the Court has and will define obscenity to you, then the verdict must be in favor of the Defendants.

Now, briefly a word with regard to the Corporate Defendants and then we will conclude. As I said, of necessity, this has to be broken up, because it is long. Some of the Defendants are corporations. A corporation is a legal entity or person, and a corporation may be found guilty of a criminal offense. A corporation, of course, may only act through natural persons who are known as its agents.

[Vol. 29, 4935] In general, any agent or representative of a corporation possessing adequate authority may bind the corporation by his acts, declarations, and omissions. In order to find a Corporation Defendant guilty, you must find that all the essential elements of the offense, as set out in these instructions, are present as to the corporation or corporations in the form of

acts or omissions of agents of the corporation within their authority.

The scope of authority of these agents is a question of fact for you to decide just as any other fact question in the case, just as in the case of an individual Defendant, the burden is on the Government to establish guilt of a Corporate Defendant beyond a reasonable doubt.

As a general rule, whatever any person is legally capable of doing himself can be done through another as his agent. So, if the acts of an employee or other agent are voluntarily and intentionally ordered or directed, or authorized or consented to by a person, then the law holds that person responsible for such acts, the same as if the acts had, in fact, been done by such person.

A corporation is in law a person, but, of course, it cannot act otherwise than through its directors [Vol. 29, 4936] or officers or employees or other agents. The law therefore holds a corporation responsible for all unlawful acts of its directors or officers or employees or other agents, provided such unlawful acts are done within the scope of their authority as would usually be the case if done in the ordinary course of their employment or in the ordinary course of their corporate business.

The authority to act for a corporation in a particular matter or in a particular way or manner, may be inferred from the surrounding facts and circumstances shown by the evidence in the case. That is to say, authority to act for a corporation, like any other fact

in issue in any action, need not be established by direct evidence, but may be established by indirect or circumstantial evidence.

Every act of every director or officer or employee or other agent on behalf of or in the name of a corporation, if done within the scope of his authority, is in law the act of the corporation itself.

An officer of a corporation cannot be held criminally responsible for an act unless he personally or actually did the act or the acts were done by others at his direction or with his permission.

VOL. 30

[Vol. 30, 4940] THE COURT: Let the record show that all twelve jurors are present in the jury box and that the alternate is also present and that the Defendants are present with their respective Counsel.

Ladies and Gentlemen of the Jury: When we concluded with the instructions, it had gotten as far as the elements of the offense as related to both of the two cases.

In expanding on the elements of the offense, I think that it is necessary that additional instructions be given in that regard, but before I do so, there was a reference made yesterday to the counts that had been dismissed. That is not exactly correct.

[Vol. 30, 4941] There are certain counts in the San Diego Indictment that were withdrawn by the Government and those are not for your consideration at this time.

To constitute the crime charged, the conspiracy crime charged, or to constitute any crime charged in the Indictment, there must be a joint operation of two essential elements: An act forbidden by law and an intent to do that act.

With regard to the crime of Conspiracy, and with regard to the other crimes, the mailing statute crimes, which I will go into a little further, the crime charged in this case is a serious crime which requires proof of specific intent before the Defendants can be convicted.

Specific intent, as the term implies, means more than a general intent to commit the act. To establish specific intent, the Government must prove the Defendant knowingly did an act which the law forbids, purposely intending to violate the law. Such intent may be determined from all the facts and circumstances surrounding the case.

An act or failure to act is done knowingly if it is done voluntarily and intentionally and not because of mistake or accident or other innocent reason. The Government must prove beyond a reasonable doubt that [Vol. 30, 4942] the Defendants acted with knowledge before there may be a conviction. This is to insure that no Defendant will be convicted because of innocent mistake or accident or inadvertence.

The requirement of knowledge in this case applies both to placing the subject material in the mails or in Interstate Commerce and to the Defendants' knowledge as to the contents of the envelopes and packages, and that is the intent required. That is to say, it must be proven beyond a reasonable doubt that:

First, the Defendants knew the envelopes and packages containing the subject materials were mailed or placed aboard a common carrier for carriage in Interstate Commerce, and

Second, that they had knowledge of the character of the materials.

In considering whether or not the Defendants had knowledge of the character of the materials, you may consider all pertinent evidence in the case. You may consider all of the circumstances in the case and all inferences reasonably drawn from the evidence to determine whether or not the Defendants acted with the requisite knowledge.

You must be satisfied beyond a reasonable doubt [Vol. 30, 4943] that the Defendants were aware of the character and the nature of the materials alleged to have been mailed or transported in Interstate Commerce.

The Defendants' belief as to the obscenity or non-obscenity of the material is irrelevant. You must also find beyond a reasonable doubt that the Defendants wilfully deposited or caused to be deposited for mailing and delivery in a Post Office establishment of the United States or caused to be transported in Interstate Commerce via a common carrier, envelopes and packages containing obscene materials.

Proof as to wilfully depositing or causing to be deposited for delivery may be wholly circumstantial. The evidence need not show that the Defendants personally mailed or placed the alleged package with a common

carrier. It is enough if the evidence in the case establishes beyond a reasonable doubt that the Defendants wilfully caused the deposit for mailing or carriage by a common carrier of a packet containing obscene materials as charged in the Indictment.

An act is wilfully done, as I have stated before, if it is done voluntarily and intentionally and with the specific intent to do something the law forbids or in this case, with the specific intent or [Vol. 30, 4944] knowledge of the contents of the package.

Proof of intent: Insofar as the proof of intent is concerned, while witnesses may see and hear and so be able to give direct evidence of what a Defendant does, there can be no eyewitness account of the state of mind with which the acts were done. Therefore, intent may be proved by circumstantial evidence. It rarely can be established by any other means.

Intent ordinarily may not be proved directly because there is no way of fathoming or scrutinizing the operations of the human mind, but you may infer the Defendants' intent from the surrounding circumstances. You may consider any statement made or done or omitted by the Defendant and all other facts and circumstances in evidence which indicate his or her state of mind.

It is ordinarily reasonable to infer that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted. Intent and motive should never be confused.

Motive is what prompts a person to act or fail to act. Intent refers only to the state of mind with which

the act is done or omitted. Personal advancement and financial gain are two well recognized [Vol. 30, 4945] motives for much of our human conduct. These laudible motives may prompt one person to voluntary acts of good and another to voluntary acts of crime. Good motive alone is never a defense where the act done or omitted is a crime. So, the motive of the accused is immaterial, except insofar as the evidence of motive may aid determination of the state of mind or intent.

Now, with respect to the matter of obscenity. The test of whether any material is obscene is as follows:

Whether to the average person applying contemporary community standards, the dominant theme of the material taken as a whole appeals to a prurient interest. Under this definition, three elements must coalesce:

1) The dominant theme of the material taken as a whole appeals to the prurient interest of the average person;

2) The material is patently offensive in that it goes substantially beyond contemporary national community standards relating to the description or representation of sexual matters; and

3) The material is utterly without redeeming social value.

[Vol. 30, 4946] Now, what is prurience? Material that appeals to prurient interest is material that has a tendency to excite lustful thoughts. Prurient is defined as itching, longing, uneasy with desire or longing, morbid or lascivious longings. Prurient interest does not

mean a mere interest in sex or a mere arousal of sexual interest. Prurient interest is a shameful or morbid interest in sex or nudity, and you must measure this appeal by the average or ordinary adult or by a clearly defined deviant group, as will be explained elsewhere.

If the material is calculated either by the physical actions it portrays or suggests, or by the focus of attention or the details and manners of portrayal to appeal to and excite in the viewer shameful, morbid, degrading, unhealthy or unwholesome interest in sex, or in details about sex, you should find it appeals to the prurient interest in sex.

In determining whether material appeals to a prurient interest, you should consider not only what is portrayed, but the way it is portrayed, and the way it is used, or the way it is described. The materials here involved must be measured by its appeal to the average adult. The average adult is, of course, determined by the synthesis of the entire [Vol. 30, 4947] community, including persons of all sexes, religions, nationalities, creeds, ages and et cetera, but once the Jury has determined the average adult, it must be remembered that the materials must be measured by such average adult and not by young persons or those persons highly susceptible thereto.

In addition to considering the average or normal person, the prurient appeal requirement may also be assessed in terms of sexual interest of the intended or probable recipient group. This group must be a clearly defined sexually deviant group.

An example of a group not sufficiently defined would be one labeled as sexually immature. I suppose one clearly defined would be homosexuals.

It is not necessary for satisfaction of the prurient appeal requirement that you find one specific type of sexual activity to constitute the dominant theme of the materials under consideration. The prurient appeal requirement is satisfied if you find the dominant theme of the materials to be one of an appeal to an inordinant, shameful, morbid, degrading, unhealthy and unwholesome interest in sex, and details concerning sex, regardless of the type of group to which the appeal is made.

There are depicted throughout the materials [Vol. 30, 4948] under consideration, various sexual activities that may or may not be found to be deviant, that may have prurient appeal, depending upon the particular sexual interest of the viewer, whether normal or deviant.

You need not limit your inquiry to whether the dominant theme of the material appeals to the prurient interest in sex of the average person. You may also consider whether some of the materials involved are designed for a clearly defined deviant sexual group, and whether such material appeals to the prurient interest in sex of the members of that group.

Consequently, if you find that some of the material appeals to the prurient interest of the average person, and some of the material appeals to the prurient interest of a deviant sexual group, that fact would not preclude your finding that the dominant theme of the material

taken as a whole is, generally speaking, one of an appeal to the prurient interest, as has been previously defined in the broad sense.

Now, as to the second test, another requirement to be applied in determining whether the material in evidence is obscene, is whether the material is patently offensive in that it goes substantially beyond what is reasonably accepted according to the contemporary standards of the community as a whole, [Vol. 30, 4949] the national community as a whole. In applying this test you must consider each book or advertisement as a whole and not part by part. You must measure the material by contemporary or current national community standards and determine whether the material so exceeds the customary limits of candor in the descriptions and representations of sex and nudity which are reasonably acceptable in the national community, that they are patently offensive.

Contemporary community standards means the standards generally held throughout this country concerning sex and matters pertaining to sex. The phrase means, as it has been aptly stated, the average conscience of the time, and the present critical point in the compromise between candor and shame, at which the community may have arrived here and now.

You are the sole judges of the contemporary community standards of this country. In arriving at and applying your judgment, however, you are not to consider your own standards. That is, of what is good or what is bad. You are not to condemn by your own standards, if you know and believe them to be stricter

than those generally held, and you are not to exculpate or excuse by your own standards, if you know and believe them to be more tolerant than those that are generally [Vol. 30, 4950] held. You are not to limit yourself to what you have learned while residing in your present locality or what you have learned or observed from and about people residing in your present locality. Rather, you are to call upon everything you have learned, seen, read, and observed from both the evidence presented at the trial and the experience you have gained from your own observations and experience in your affairs of life.

If you find the materials in evidence to substantially exceed the limits of candor in the descriptions and representations of sex which are acceptable in the national community, then you may find the material to be patently offensive.

You will note that the book and advertisement here involved cannot be found to be obscene unless the evidence shows beyond a reasonable doubt that these materials substantially exceed customary limits of candor in the nation as a whole in the description and representation of sex and nudity.

The word "substantially" has been defined as greatly or considerably, or largely. The contemporary community standards of the nation, are set by what is, in fact, reasonably accepted by the national community as a whole. That is to say, by society [Vol. 30, 4951] at large or people in general throughout the nation, and not by what some persons or groups of persons may believe the national community as a whole ought

to accept or refuse to accept. It is a matter of common knowledge of which the Court takes judicial notice, that the customs change and that the national community as a whole may, from time to time, find acceptable that which was formerly unacceptable.

Now, in determining and applying contemporary national community standards, you must consider what appears generally in magazines, books, newspapers, television, burlesque, night clubs, novels, motion pictures, the stage, and other media of communications in the nation as a whole, insofar as social value is concerned.

The Third Element: The next test to be applied is whether the books or advertisements are utterly without redeeming social value. The material cannot be branded obscene unless it is found to be utterly without redeeming social value. This is so even though the book or magazine is found to possess the requisite prurient appeal and to be patently offensive. As I explained, all three elements must coalesce.

Obscenity is excluded from constitutional protection of the First Amendment because it is utterly [Vol. 30, 4952] without redeeming social importance. Obscene utterances are not an essential part of an exposition of ideas and are of such slight value as a step to thought that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. Of course, the mere fact that material deals with sex does not mean that it cannot have value to society. Indeed, some material can have social importance if it portrays sex in a manner that advocates ideas and that has literary, scientific, or artistic value.

It is for you to determine whether the materials at issue in this case are of value to society. Only if you find that they are utterly without redeeming social value—social importance—can you brand them obscene. Material has social value if it has the capacity to broaden man's range of sympathies and consciousness or to enable him to see, hear, or appreciate what he might otherwise have missed, or deepens his emotions or makes his life seem richer, more interesting, or more comprehensible, or offers entertainment or provides insight into man's relationship to the society in which he lives. Materials may have social value even if it appears worthless to the average person or to most people.

[Vol. 30, 4953] The Court has instructed you that material may not be condemned as obscene unless it substantially exceeds contemporary national community standards, appeals to prurient interest, and is utterly without redeeming social value.

The word "redeeming", in the context herein, refers not to a balancing of the alleged prurience against the social importance of the material, but rather, to the presence of matters of social value in the content which will recover for the material its position as constitutionally protected.

Under the law, the word "utterly", which appears in the definition, has been defined in law as follows:

"To an absolute or extreme degree, to the full extent, absolutely, altogether, entirely, fully, thoroughly, totally."

Having covered the three elements of obscenity, there is one additional matter that you may consider

and that is the matter of pandering. You must make the decision whether the materials are obscene under the test I have given you. In making this determination you are not limited to the materials themselves. In addition, you may consider the setting in which they were presented. Examples of what you may consider in this regard are such things as: Manner of distribution, [Vol. 30, 4954] circumstances of production, sale, and advertising. The editorial intent is also relevant. What you are determining here is whether the materials were produced and sold as stock in trade of the business of pandering. Pandering is the business of purveying textual or graphic matter openly advertised to appeal to erotic interest of the customer. It is a deliberate representation of publications as erotically arousing, an attempt at titillation, rather than saving intellectual content.

The question of obscenity is to be answered by application of the basic test recited earlier, but if you find this to be a close case under that test, then you may consider the evidence of pandering to assist you in your decision. Such evidence is pertinent to all three elements of the basic test of obscenity.

The circumstances of presentation and dissemination of material are especially relevant to a determination of whether the social importance claimed for the material is pretense or reality, whether it was the basis upon which it was traded in the market place or a spurious claim for litigation purposes. Where the distributors' sole emphasis is on the sexually provocative aspects of [Vol. 30, 4955] the publications, that fact may be decisive in the determination of obscenity.

An item may have social value in one circumstance, yet not in another. For example, a scientific publication containing graphic sexual depictions would not be obscene if distributed in a controlled or neutral environment. The same publication, however, indiscriminately distributed, with a deliberate emphasis on the sexually provocative aspects of the work, might be found to be obscene.

In summary, evidence of pandering simply is useful in applying the basic obscenity test where an exploitation of interest in titillation by pornography is shown with respect to the material lending itself to such exploitation through pervasive treatment or description of sexual matters. Such evidence may support the determination that the material is obscene, even though, in other context, the material would escape such condemnation.

There has been evidence introduced in this case to show that the individuals purchasing the books charged as obscene in Counts 19 and 21 of Criminal Number 10791, which is the San Diego case, were adults who willingly consented to purchase and did, in fact, [Vol. 30, 4956] purchase the books in question. The fact that the individuals making such purchases, all of whom were Law Enforcement Officers, were indeed adults, is of no relevance in this case. The fact that they were adults is not relevant in this case. If the material involved is found by you to be obscene, and if, in fact, it was knowingly deposited by these Defendants, including the corporations, for movement in the United States Mails, and the Defendants had

knowledge of the character of the materials, then the offense has been proven irrespective of whether or not such activity was taken pursuant to the acceptance by a Law Enforcement Agent of the offer for sale, which had previously been made by any of these Defendants or all of them.

Now, a word about the First Amendment Rights. The First and Fourteenth Amendments to the Constitution of the United States guarantee freedoms of speech and press. It is a basic guarantee of the First Amendment that one is free to advocate ideas. With respect to the nature of the ideas, they may be the widest variety, including the unorthodox, the controversial, or even ideas hateful to the prevailing climate of opinion, but unless they are integrated with unlawful conduct, such ideas have the full [Vol. 30, 4957] protection of the guarantees of the First Amendment.

The guarantee of the Constitution is not confined to the expression of ideas that are conventional or shared by the majority. No media of communication, including books and advertisements, such as are involved in this case, may be deemed obscene merely because they are distributed and sold commercially.

The book, the Illustrated Presidential Report of the Commission on Obscenity and Pornography, has been charged with being obscene. That means, you must consider the book as a whole, including all of the writing therein. You may not consider the pictures in isolation. To do so would be a violation of the Constitutional guarantees which provide that the book may

not be condemned because a portion thereof, considered in isolation, may be thought to offend the law.

A book or advertisement, under the law herein, cannot be judged merely by the effect of an isolated scene upon a particularly susceptible person. Judging obscenity by the effect of isolated scenes upon most susceptible persons, might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of [Vol. 30, 4958] speech and press.

You have been instructed that you have a duty to follow the law as I gave it to you. Part of that law, as stated, is that you must consider the book as a whole, including the writing, in making the determination of whether or not the book and the advertisements are obscene. The book, in this case, contains opinions of what the law is and what the law ought to be. That is unique. You may consider those opinions in the sense of whether or not they, by the very fact that they are opinions, add to the overall social value, if any, of the book, but you are not to consider any statements of law as being the law if it is contrary to the law as I have stated it to you. In other words, any statement in the book that claims to represent what the law is, must not be considered by you as a source of law to be applied in this case.

The source of law to be applied in this case comes from me. Also, any statement claiming to represent what the law was in the past or ought to be in the future, must not be considered by you as relevant, as it is irrelevant to this particular case.

Only the instructions I give you from the bench are the law. They alone must be applied by you to the facts of the case in order to arrive at your [Vol. 30, 4959] verdict.

The book in this case also contains various findings and recommendations of the Commission and individual members thereof. Here again, you may consider these findings and recommendations for whatever value they may have as ideas in determining whether or not the book, taken as a whole, has redeeming social value, but the substance of those findings and recommendations—that is, what was allegedly found to be true—and what recommendations were actually made pursuant to those findings, are of no concern to you in this case, except as stated above.

Their truth or their falsity has not been an issue in this trial and is irrelevant to the findings that you, the Trial Jury, must make on the question of whether or not the book is obscene. Equally as well, your own personal and social views on the material, such as that charged in the Indictment, may not be considered, the material being the book and the advertisements.

Thus, whether you believe that the book and the advertisements are good or bad is of no concern. So, too, you must not consider whether, in your opinion, the book and advertisements are moral or immoral, [Vol. 30, 4960] whether they are likely to be helpful or injurious to public morals.

Similarly, whether you like or dislike the book and advertisements, whether they offend or shock you, may not be considered by you. You may think the book

and the advertisements are immoral, shocking or offensive, and you must acquit the Defendants if the book and advertisements are not obscene as the Court has defined that term to you.

Do not apply your own standards, as I have tried to explain to you. You apply the standards throughout the nation. What you find the standards to be throughout the nation, I think is probably a better statement.

The Court may take judicial notice of certain facts or events. When the Court declares it will take judicial notice of some fact or event, you may accept the Court's declaration as evidence and regard as proved the fact or event which has been judicially noticed, but you are not required to do so, since you are the sole Judges of the Facts. You may take it, but you are not required to accept if.

Now, with respect to the evidence in this case, you are to consider only the evidence in the case, but in your consideration of all of the evidence [Vol. 30, 4961] in the case, you are not limited to the bald statements of witnesses. In other words, you are not limited solely to what you see and hear as the witnesses testify. You are permitted to draw from facts which you find to have been proved, such reasonable inferences as you feel are justified in the light of experience. Unless you are otherwise instructed, anything you may have seen or heard outside the courtroom is not evidence and must be entirely disregarded.

It is the duty of the attorney on each side of the case to object when the other side offers testimony or other evidence which the attorney believes is not prop-

erly admissible. You should not show prejudice against an attorney or his client because the attorney has made objections. Upon allowing testimony or other evidence to be introduced over the objection of an attorney, the Court does not, unless expressly stated, indicate any opinion as to the weight or the effect of such evidence.

As stated before, the jurors are the sole judges of the credibility of all of the witnesses and the weight and effect of all of the evidence. When the Court has sustained an objection to a question addressed to a witness, the Jury must [Vol. 30, 4962] disregard the question entirely and may draw no inference from the wording of the question and may not speculate as to what the witness would have said if the question had been answered.

If a lawyer asks a witness a question which contains an assertion of a fact, you may not consider the assertion as evidence of that fact. The lawyer's statement is not evidence.

It is the duty of the Court to admonish an attorney who out of zeal for his cause, does something which is not in keeping with the rules of evidence or rules of procedure. You are to draw no inference against the side to whom an admonishment of the Court may have been addressed during the course of the trial of this case.

There is nothing peculiarly different in the way a Jury should consider the evidence in a criminal case from that in which all reasonable persons treat any questions depending upon the evidence presented to them. You are expected to use your good sense. Con-

sider the evidence in the case for only those purposes for which it has been admitted and give it a reasonable and fair construction in the light of your common knowledge of the natural tendencies and inclinations of human beings.

[Vol. 30, 4963] If the accused be proved guilty, say so. If not proved guilty, say so.

The punishment provided by law for the offense or offenses charged in the Indictment is a matter exclusively within the province of the Court and should never be considered by the Jury in any way in arriving at a fair and impartial verdict as to the guilt or innocence of the accused.

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous. It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for himself, but do so only after an impartial consideration of the evidence in the case with your fellow jurors.

In the course of your deliberations, do not hesitate to re-examine your own views or change your opinion if convinced it is erroneous, but do not surrender your honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors, or for the mere purpose of arriving at a verdict.

[Vol. 30, 4964] Remember at all times you are not partisans, you are judges, Judges of the Facts. Your

sole interest is to seek the truth from the evidence in the case.

A separate crime or offense is charged against each of the Defendants in each count of the Indictment. Each offense, the evidence pertaining to it, should be considered by you separately. The fact that you may find one or more of the Defendants guilty or not guilty of one or more of the offenses charged in the Indictment, should not control your verdict as to any other offense charged against any of the other Defendants.

It is your duty to give separate and personal consideration to the case of each individual Defendant, that includes the corporations. When you do so, you should analyze what the evidence shows with respect to that individual, leaving out of your consideration—entirely—any evidence admited solely against some other Defendant or Defendants. Each Defendant is entitled to have his case determined from evidence as to his own acts and statements and conduct and any other evidence which may be applicable to him.

Unless otherwise stated, the Jury should consider each instruction given to apply separately [Vol. 30, 4965] and individually to each Defendant on trial.

Upon retiring to the jury room, you may and will select one of your number to act as Foreman. The Foreman will preside over your deliberations and will be your spokesman here in Court.

The Court has provided a form of verdict for you and of necessity, they are lengthy. With respect to the Texas case:

First, it is under our number and it is headed, "The United States District Court, Southern District of California," because it now becomes our case, having been consolidated for trial.

"Case Number 11971, United States of America, Plaintiff, versus William L. Hamling, Defendant.

We, the Jury in the above entitled cause, find the Defendant William L. Hamling," and then you will cause your Foreman to insert the word, "Guilty" or "Not Guilty"—"of knowingly using a common carrier for carriage in Interstate Commerce of obscene books as charged in Count 1 of the Indictment", and then there is a blank space and you will cause your Foreman to insert "Guilty" or "Not Guilty"—"of knowingly using a common carrier for carriage in Interstate Commerce of obscene books as charged in Count 2 of the Indictment."

[Vol. 30, 4966] The Foreman will then, upon arriving at a verdict, sign the verdict and date the verdict.

Now, the verdict for Greenleaf Classics is identical and the verdict for Reed Enterprises is identical. These are the three verdicts of the three charged Defendants in the Texas case, Number 11971.

In the San Diego case, Number 10791, we have caused to be prepared a total of seven verdicts, one for each of the seven Defendants alleged in that particular Indictment. I will not go through each of the seven. I will simply go through one of them.

The verdict form reads:

"The United States District Court, Southern District of California; United States of America, Plaintiff, versus

Earl Kemp, Defendant, Case Number 10791; Criminal Verdict.

We the Jury in the above entitled cause find the Defendant, Earl Kemp", and then there is a blank space. You will insert the word "Guilty" or "Not Guilty" . . . "of", and then it goes right down by counts, "conspiracy to use the United States Mails for the mailing and carrying in the mails of non-mailable matter as charged in Count 1 of the [Vol. 30, 4967] Indictment";

And you will insert the word "Guilty" or "Not Guilty" . . . "of knowingly using the mails for mailing an obscene advertisement as charged in Count 2 of the Indictment";

And "Guilty" or "Not Guilty" . . . "of knowingly using the mails for mailing an obscene advertisement as charged in Count 3 of the Indictment";

And "Guilty" or "Not Guilty" . . . "of knowingly using the mails for mailing an obscene advertisement as charged in Count 4 of the Indictment";

And "Guilty" or "Not Guilty" . . . "of knowingly using the mails for mailing an obscene advertisement as charged in Count 5 of the Indictment";

And "Guilty" or "Not Guilty" . . . "of knowingly using the mails for mailing an obscene advertisement as charged in Count 7 of the Indictment";

And "Guilty" or "Not Guilty" . . . "of knowingly using the mails for mailing an obscene advertisement as charged in Count 8 of the Indictment";

And "Guilty" or "Not Guilty" . . . "of knowingly using the mails for mailing an obscene advertisement as charged in Count 9 of the Indictment";

And "Guilty" or "Not Guilty" . . . "of knowingly using the mails for mailing an obscene advertisement [Vol. 30, 4968] as charged in Count 10 of the Indictment";

The same for Count 11 and the same for Count 12 and the same for Count 13.

In Count 14, "Guilty" or "Not Guilty"—"of knowingly using the mails for carriage of an advertisement giving information of where, how and from whom and by what means an obscene book might be obtained";

And "Guilty" or "Not Guilty"—"of knowingly causing to be delivered said envelope and its contents as charged in Count 15 of the Indictment";

Count 16 is the same; Count 17 is the same.

Count 18 you would cause your Foreman to insert the word "Guilty" or "Not Guilty"—"of knowingly using the mails for carriage of an obscene book as charged in Count 19 of the indictment";

And Count 21 is the same.

When you have arrived at a verdict—have been filled in as I have indicated, you will cause your Foreman to sign the verdict and date the verdict. There is one verdict here for each of the seven Defendants alleged in the San Diego Indictment.

Now, perhaps it is proper at this stage, Ladies and Gentlemen, to add the caution that nothing said in

these instructions and nothing in any form of verdict prepared for your convenience is to suggest or [Vol. 30, 4969] convey in any way or manner any intimation as to what verdict I think you should find. What the verdict shall be is the sole and exclusive duty and responsibility of each and every one of you as jurors in this case.

* * *

THE COURT:

Now, for the purposes of the record, Mr. Fleishman, your objections—all of your objections to the instructions have heretofore been noted and I said that I would give note to that fact before I concluded the instructions.

Do you have any comments to make?

[Vol. 30, 4970] MR. FLEISHMAN: Yes, Your Honor.

I think the matter is at this stage very sensitive with the Jury here. I would suggest it wouldn't take long, perhaps not more than four or five minutes, but I would urge the Court to ask the Jury to go into the jury room while we present it.

I gather that sometimes words drift over to the Jury at this stage of the proceedings.

THE COURT: You have made all the objections suitable that I can think of. I want to send this Jury out. If you want to make a statement, make a statement.

MR. FLEISHMAN: I would ask the Court if it is convenient, that they be excused for a few moments.

THE COURT: No.

MR. FLEISHMAN: First of all, with regard to the social value, Your Honor referred to the book and magazine rather than the book and advertisement. I think that has to be corrected. You said book and magazine, the social value test applies. I know it was a mistake in reading. At least, that is what I heard. I think that ought to be corrected.

THE COURT: All right.

MR. FLEISHMAN: In instructing the Jury on expert witnesses, Your Honor has in effect told the [Vol. 30, 4971] Jury, as I heard it, that they may disregard the testimony of the expert witnesses even if they find that the experts are honest people and know what they are talking about.

I don't believe that is the law. I think the Jury is required to give weight to the expert opinion of expert witnesses and may not disregard them once they find that the experts have been testifying truthfully. They may, if they find they are an untruthful witness, disregard them, but if they are testifying truthfully, it is contrary to the law to tell the Jury, as Your Honor has, that they may disregard the expert opinion of witnesses.

Next, Your Honor gave an instruction which said that the number of witnesses was totally irrelevant, or I believe that is the import of what the instruction was. This is a mistake.

It is true that if there are more witnesses on one side, that need not be determinative, but the fact that there are more on one side is, on the other hand, of some weight. I think that Your Honor has taken

away from us unfairly what we are properly entitled to. Witnesses have been called; more witnesses than the Government did.

With regard to the Texas case, Your Honor [Vol. 30, 4972] used the term "indecent character". I believe that term in that statute, the Interstate Commerce Statute, rather than the Mailing Statute—the language is different. There was no use of the term "indecent character" in the Mailing Statute.

When Your Honor was talking about the Texas case, Your Honor did refer to "indecent character".

There was no statement made by Your Honor to the Jury: Indecent character has no meaning different than the term "obscene". Your Honor did do that with regard to the mailing statute aspect of the case, where Your Honor did say "lewd and lascivious" and the like—obscenity only, but on indecent character, the language is different in the two statutes.

Your Honor has instructed the Jury that they had to have knowledge of the character of the material. Your Honor at no time instructed the Jury what that means. We have previously made our position clear, and we repeat it, of course.

THE COURT: We understand.

MR. FLEISHMAN: We believe that it means at least the obscene character.

With regard to the instruction as to where, how and from whom, the sections, we previously pointed out our objection to the fact that there was no reference [Vol. 30, 4973] there, even to the Defendants' actual knowledge of the character of the book. Your

Honor said there were only three elements there: Knowingly used the mail, advertising, giving information, and that the book is obscene.

We believe there has to be the additional requirement that the Defendants knew the book to be obscene, under Your Honor's instruction. They would have to know the character of the book which was mailed pursuant to where, how and from whom the advertisement was mailed.

Then Your Honor did something which I believe is very harmful to the Defendants. After Your Honor had told the Jury that under this count of the Indictment, they need not find the advertisement to be obscene, Your Honor went on to say that, if you find the advertisement to be obscene, and the book not obscene, then they could find the Defendants guilty under the earlier counts.

THE COURT: That is correct.

MR. FLEISHMAN: Well, it is correct except, Your Honor, they referred to the knowledge that at that point they found it obscene without their knowing the "character". We should define "character" at that point. Your Honor told the Jury less than the [Vol. 30, 4974] essential elements even as Your Honor had given it. It was, perhaps, an inadvertent statement, but you told them that if they found the advertisement obscene, and the book not obscene, they could convict.

MR. BUTCHER: Counsel, he also forgot to mention mailing, but I don't think anyone was confused.

MR. FLEISHMAN: We specifically object to Your Honor's instruction that the belief on the part of the Defendants that the material is not obscene is absolutely irrelevant. It may not be a complete defense as we believe it to be, but we think it is relevant. All of the cases hold at least good faith—belief it was not obscene has a relevance to the case. That that statement is a misstatement of the law, even if Your Honor doesn't accept our position. That the knowledge of obscenity or good faith—belief in non-obscenity is an absolute defense, that certainly is not irrelevant. It certainly would at least be relevant with regard to the so-called pandering instruction.

On the issue of obscenity, Your Honor told the Jury that the material appeals to prurient interest if it has a tendency to excite lustful thoughts. The "tendency" is much too broad, Your Honor. It has to be proof beyond a reasonable doubt that it does—in [Vol. 30, 4975] fact—arouse these lustful thoughts. "Tendency" is too loose and too vague. We would object to that.

We object on prurience, Your Honor, on Line 17. Your Honor said, "If the Jury 'should find' "—should find that it appeals to a prurient interest in sex, this is an over statement. Not "may", but "should" as a requirement—appeal to shameful and morbid interest, and a lot of other interest, and all of these things have to do with what may be, but the "should", I believe, is stating it stronger than the law is, and unfairly to the Defendants.

Your Honor had put into the instructions something that we were not advised of at the time we were arguing. At that time, the only instruction that I was aware of was that Your Honor was going to instruct that a clearly defined sexually deviant group was not a sexually immature group. Your Honor did say here to the Jury—after I had argued—that homosexuals is a clearly defined group. I think—I know we were prejudiced by that, Your Honor. If I knew the Court was going to instruct that way, I would have wanted to and I would have argued with regard to that matter.

To that entire aspect—very briefly—with [Vol. 30, 4976] regard to instructing on the sexually deviant group, we object for the reasons previously stated, but in its simplest form, that it was not charged in the Indictment. It was not charged in the Bill of Particulars when we asked whether the material was charged as appealing to the average person. In the Bill of particulars—

THE COURT: You have already made all those objections.

MR. FLEISHMAN: In the Bill of Particulars only. There is no evidence which would support the giving of such instructions.

Then, the Court compounded it, Your Honor, by saying that the book and the advertisement could be found guilty of prurient interest if it appealed to the prurient interest of the average person or any of the undefined group of sexually deviant groups—appeal to the prurient interest of one sexually deviant group or

of another, so to still a third deviant group. This is unconstitutional according to the testimony.

With regard to the pandering instruction, again we object for the reasons previously stated. The Bill of Particulars did not charge pandering at all, and there was no evidence of pandering. The [Vol. 30, 4977] way Your Honor gave the instruction, it was just a one-way street. Your Honor did not give, as Your Honor should have, both sides of the coin.

That is to say, pandering is a charged word. If Your Honor is going to instruct that the circumstances of production, distribution and the like is relevant, that would be relevant both ways. There is an editorial format that would in a close case tend to show that the material is not obscene. Your Honor presented it as if the circumstances were only to be viewed adversely to the Government.

We feel that if Your Honor is going to give an instruction to the circumstances and the like, that those circumstances may tend to show that the material under the circumstances that it was produced and the like, show that it is not obscene.

A perfect example of that, Your Honor, is that after you told the Jury that the circumstances of distribution may be considered and taken into account, then Your Honor went on to say that the fact that the material was distributed to consenting adults—that is to say, Postal Inspectors who were twenty-one years of age, and who said they were twenty-one years of age and who, in the order form they had signed, said that they were twenty-one and said they wanted it

only for [Vol. 30, 4978] their own private use in the privacy of their own home—Your Honor said that is wholely irrelevant. If circumstances of distribution are relevant, they are relevant both ways. That would be relevant in the Defendants' favor on that side of the score, Your Honor.

To use the term "pandering"—which is emotionally charged—against us and then to focus upon all of those factors which would have a negative implication and omit from the Jury's consideration those factors which would have a positive implication for the Defendants, is error, and denies the Defendants due process of law.

Beyond that, Your Honor, as we have said before, we object to Your Honor's failure to give instructions we tendered on the sexual [essential] elements; that is to say, just briefly, on knowledge.

Our theories are quite different on the obscenity, as we have proposed it, and on the conspiracy, where we have tendered a large number of instructions which have tied the notion of conspiracy to circulation of the press which we believe has different consequences than a normal conspiracy case.

In short, Your Honor, we object to the instructions given by the Court as denying to the [Vol. 30, 4979] Defendants due process of law and denying rights to freedom of speech and press secured by the First Amendment.

We would object to the refusal of the Court to give the instructions we requested on the same grounds, and we would ask the Court now to make those cor-

rections that the Court thinks is appropriate after our having called them to the Court's attention. Thank you.

THE COURT: All right.

MR. KATZ: Just one thing, Your Honor. I thought I recall the Court indicating—giving an instruction on the fact that material may depict sexual intercourse, masturbation, sodomy, bestiality, oral copulation, et cetera—does not necessarily mean the material is obscene.

Now, I didn't hear the Court give it. I am not positive.

THE COURT: No, I would not give that instruction.

MR. KATZ: All right.

THE COURT: Is there anything else?

MR. KATZ: That was Defendants' 22.

THE COURT: Yes, I understand.

MR. KATZ: Now, just so it is clear, my clients [Vol. 30, 4980] join in the objections Mr. Fleishman has made and all the objections made at the previous conference are incorporated—

THE COURT: Correct.

MR. KATZ: —in these objections made.

THE COURT: All right. Mr. Butcher?

* * *

[Vol. 30, 4982] THE COURT: Ladies and Gentlemen of the Jury:

If during my instructions I referred to the advertisement as a "magazine", rather than an advertisement, please disregard that reference.

If it becomes necessary, Ladies and Gentlemen, during your deliberations to communicate with the Court, you may send a note by the Bailiff signed by your Foreman or by one or more members of the Jury. No member of the Jury should ever attempt to communicate with the Court by any means other than a signed writing, and the Court will never communicate with any member of the Jury on any subject touching on the merits of the case, other than in writing or orally here in open Court.

You will note from the oath about to be taken by the Bailiffs that they too as well as all other persons are forbidden to communicate in any way or in any manner with any member of the Jury on any subject touching on the merits of the case.

Bear in mind also that you are never to reveal to any person, not even to the Court, how the jury stands numerically or otherwise on the question of the guilt or innocence of the accused, until after you have reached a unanimous verdict.

All right. You may swear the Bailiffs, Mr. Clerk.

[Vol. 30, 4983] (Oath administered.)

THE COURT: All right. Ladies and Gentlemen of the Jury: At this time you will retire for your deliberations. You may begin your deliberations.

* * *

VOL. 31

[Vol. 31, 4989] THE COURT: Let the record show that all 12 jurors are present, the defendants are present with their respective counsel, and perhaps I ought to introduce you to Mr. Warren Reese, United States Attorney's Office, who I am sure you have met already, who is sitting in for Mr. Butcher; and Mr. Irwin Gostin, who is the partner of Mr. Katz, who is sitting in for Mr. Katz.

Mr. Allen, you have indicated a request, which is Court's Exhibit 9, and which reads as follows:

> "December 17, 1971. The jury requests that Judge's Instructions concerning the law on obscenity be re-read at the Court's earliest [Vol. 31, 4990] convenience. Monday morning preferred. Charles Allen, Foreman."

I wrote back:

"All right, Monday A.M." and then I initialed it.

Mr. Allen, is that your desire?

FOREMAN ALLEN: Yes, it is your Honor.

THE COURT: Now I am a little concerned about the scope of what you want me to read. I can begin with the violations of the statute, the alleged violation of the statute, and I take it what you are concerned about is the entire part of the instructions having to do with obscenity; is that correct?

FOREMAN ALLEN: Right. We have copies of the Indictments and we have no wish to have those re-read.

It was just your instructions on the three-pronged points of obscenity and of the pandering.

* * *

[Vol. 31, 5010] Now, does that answer your questions?

[Vol. 31, 5011] FOREMAN ALLEN: Yes, it does.

* * *

[Vol. 31, 5012] MR. FLEISHMAN: If the Court please, for the record I would like to repeat the objections we have previously stated with regard to the instructions on the law of obscenity, both in what the Court did instruct erroneously as we believe and failed to instruct as we had requested.

I particularly, however, would like to focus on the pandering instruction as it has come up in this case, your Honor. Given the law as I understand it, if pandering is to be given at all it is a matter of evidence. It is an evidentiary matter. That being so, it seems to me that your Honor should have, and I would request your Honor at this time to do so—that your Honor should have given the instruction on reasonable doubt and presumption of innocence, which also bears upon the question of whether something is obscene.

[Vol. 31, 5013] What your Honor has told the jury basically is that the test is, of course, whether the material is obscene or not, that pandering is of some value as of a matter of evidence, and I think that your Honor has given the Government's aspect of the evidentiary matter.

The evidentiary matter that seems to us to be of great moment at this moment is that there is a presumption of innocence and the reasonable doubt.

I think that those instructions at this time ought to be given to the jury to balance off the pandering instruction, your Honor, and I so request.

THE COURT: The request is denied.

* * *

VOL. 32

* * *

[Vol. 32, 5053] THE COURT: On which motion are you going to address yourself?

MR. FLEISHMAN: I will start first, Your Honor, on the Motion and Arrest of Judgment, * * *

[Vol. 32, 5074] Now, turning to the Judgment of Acquittal, Motion for Judgment of Acquittal, Your Honor, * * *

[Vol. 32, 5086] Your Honor, we have alternatively, of course, made Motions for New Trials. * * *
[Vol. 32, 5091] Mr. Katz.

MR. KATZ: Thank you, Your Honor. May it please the Court, Mr. Prosecutor, Mr. Fleishman. At the outset, Your Honor, I would like to adopt all of the arguments and the papers filed by Mr. Fleishman. They were filed on behalf of all Defendants, and I join in them. I think he has adequately covered the law very well. I also believe that the information contained in Mr. Fleishman's arguments are persuasive.

I would just like to talk briefly, Your Honor, about the three Defendants that I am representing and discuss some factors that I think the Court should consider in deciding the motions.

* * *

[Vol. 32, 5101] THE COURT: All right. No, I have no other inquiry.

Taking the motions in order, gentlemen, first of all let me say that it was with a great deal of effort and a great deal of concern that the Motion for Judgment of

Acquittal at the close of the Prosecution's case and again at the close of the entire case was denied. I had reviewed the evidence completely at the close of the Prosecution's case, because of the Motion for Judgment of Acquittal and again at the close of the entire case, before the case was submitted to the Jury, and have now again reviewed the factual matters in the case. I think that we have to look at what occurred here over the past thirty some odd days that we were in trial in the case.

First of all, it wasn't as though the Jury, as [Vol. 32, 5102] I perceived it, were uninformed of the entire law in the field of obscenity, as they had before it—before them throughout the trial, a publication which had a section devoted primarily, if not exclusively, to the law and the case law in the field.

They perceived the witnesses, each with lengthy cross-examination, some with lengthy direct examination, even to the point of lengthy qualification examination. It seems to me that they deliberated, if my memory serves me correctly, something in excess of four to five days, maybe longer, and I think that one would have to say that the Jury was astute in their verdict.

I think the Jury perceived the law as stated by the Court, and the Court diligently, I can assure you, worked on the instructions that were given, because there are areas of the law here that have been in a state of change, there is no question about that. The entire field is in a state of change. The Supreme Court

has set down certain guidelines and based upon those guidelines, the Court instructed the Jury accordingly.

I felt at that time—that is, at the close of the Prosecution's case—that there was sufficient to go to the Jury, sufficient evidence to go to the Jury as to all Defendants. I felt at the close of the [Vol. 32, 5103] entire case there was sufficient evidence to go to the Jury as to all Defendants. And I feel now that there was sufficient evidence as to all Defendants to go to the Jury.

According to one Ninth Circuit Case—it is the case of *Sabban versus People of the Territory of Guam, 434 Fed. 2nd. 837*, the Ninth Circuit has indicated that all that is required on the Jury is that it weigh all of the evidence, direct and circumstantial, against the standard of reasonable doubt. The proper test is not whether the evidence excludes every hypothesis except that of guilt, but rather whether the jurors could reasonably arrive at their conclusions.

It seems to me that the fact that the Jury was unable to arrive at a conclusion relative to the publication of the book and even to the extent that they did not acquit Greenleaf Classics relative to the publication of the book—they simply did not decide it or could not decide it—and that after some five plus days, they concluded that the brochure was, in fact, obscene; was, in fact, mailed by these Defendants, as they convicted them all of all counts relative to the brochure; convicted none of any counts relating to either the book itself or the brochure, insofar as those counts that dealt with where and how [Vol. 32, 5104] the

book could be obtained. There was no verdict reached in that regard. The verdict is not, in my opinion, was not then and is not now, the least bit inconsistent.

It seems to me that the Government put on sufficient evidence for that which the Jury—of that which the Jury convicted the Defendants, and that is of the conspiracy charge, which one would have to assume related to the brochure as the conspiracy charge did, used the words both "obscene advertisements and obscene books." So, the verdict is consistent insofar as it goes and insofar as the Jury could make the determination that they did.

I think that if we analyzed the verdicts, they have found and could find each of the Defendants guilty, except that of Greenleaf Classics of the conspiracy and of each count setting forth the mailing of the brochure.

As I recall, the Jury was instructed more than one time on more than one aspect of this case and I think the most recent instruction, prior to the verdict being rendered, was that of the—if my memory serves me correctly—was that of the aspect of redeeming social value test, that portion of the test of obscenity.

I cannot say and I do not say that there is insufficient evidence to convict these Defendants of [Vol. 32, 5105] the charges that they were convicted of by twelve reasonable and I might add, what I thought were astute people. I do not choose to upset that verdict, as I believe in the verdict.

I believe that it was a correct verdict under all of the circumstances and I believe that the Jury diligently

labored in order to obtain the verdict that they did. I think one would have to see the Jury as I saw it and as you saw it, all of you, for the period of time that you did, to see how diligently and how much effort they put into the case. It wasn't a matter of being decided in a matter of hours or even a matter of days, it was a matter of several days. There was a great deal of evidence and a great deal of exhibits.

So, insofar as the Motion in Arrest of Judgment is concerned, then, as it pertains to the Indictment and so forth, I have already ruled on that prior and I would rule the same way again that that motion is denied.

Insofar as the Motion for a New Trial is concerned, I find nothing in the trial that would lead me to grant such a motion, and, in fact, to the contrary, having the feelings that I do, that the Jury verdict was proper in all respects. I would deny that motion.

With regard to the Motion for Judgment of [Vol. 32, 5106] Acquittal, this motion, as I said before, was passed upon by me on two prior occasions. I have re-reviewed the test as set forth in Wright and the test as I read, as set forth in the Ninth Circuit, again would deny that motion.

* * *

OPINION AND JUDGMENT OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT

The opinion and judgment of the Court of Appeals for the Ninth Circuit appears in Appendix A to the petition for a writ of certiorari, filed on September 18, 1973, and granted on January 14, 1974 (October Term 1973, No. 73-507).

ORDER OF THE COURT OF APPEALS DENYING PETITION FOR REHEARING

The order of the Court of Appeals denying petition for rehearing appears in Appendix C to the petition for a writ of certiorari, filed on September 18, 1973, and granted on January 14, 1974 (October Term 1973, No. 73-507).

Supreme Court of the United States

No. 73-507

William L. Hamling, et al.,

Petitioners,

v.

United States

ORDER ALLOWING CERTIORARI. Filed January 14 ----------, 19 74.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth ----------Circuit is granted. The case is set for oral argument in tandem with No. 73-557.